SUPREME COURT, U.S.
FILED

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IN THE

Supreme Court of the United States

October Term, 1997

KANSAS PUBLIC EMPLOYEES
RETIREMENT SYSTEM,

Petitioner,

v.

BLACKWELL, SANDERS, MATHENY, WEARY
& LOMBARDI, L.C., A LAW PARTNERSHIP, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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130 pp

QUESTIONS PRESENTED

1. When federal litigation involves a State as a party, and the outcome of the litigation hinges on an issue of the proper interpretation of that State's law, do principles of cooperative judicial federalism require that a federal court defer to that State's highest court (either by staying its hand, or by certifying the issue) once informed that the court currently has that very issue under consideration?

2. Should this Court grant the petition, vacate the judgment below, and remand for further consideration in light of an intervening decision from the Kansas Supreme Court confirming that the court of appeals incorrectly decided the dispositive statute-of-limitations issue of Kansas law against the State of Kansas, in an action involving up to $65 million (plus interest) in public funds?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, the Kansas Public Employees Retirement System, is "a body corporate and an instrumentality of the State of Kansas." K.S.A. § 74-4903. It has no parent company or subsidiary.

Respondents, listed in alphabetical order, are as follows:

Blackwell, Sanders, Matheny, Weary & Lombardi, L.C., a law partnership;

Robert Crew, an individual;

Sherman Dreiseszun, an individual;

Kenneth H. Koger, an individual;

KPMG Peat Marwick, an accountancy firm;

Brent Messick, an individual;

Thomas S. Morgan, co-executor of the estate of Frank S. Morgan;

Marilyn J., co-executor of the estate of Frank Morgan;

I. I. Ozar, an individual;

Peat, Marwick, Mitchell & Co., an accountancy firm;

Ronald Reimer, an individual;

Reimer & Koger Associates, Inc., a Kansas Corporation;

William H. Sanders, Sr., individually and as the representative of a defendant class;

Frank Sebree, an individual;

Clifford W. Shinski, an individual;

Shook, Hardy & Bacon, through C. Patrick McLarney, acting as a representative of an agreed upon class of partners in Shook, Hardy & Bacon, and for Shook, Hardy & Bacon P.C.; and

Robert Spence, an individual.

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PETITION FOR A WRIT OF CERTIORARI

The Kansas Public Employees Retirement System ("KPERS") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on May 13, 1997, and the Eighth Circuit's subsequent failure to grant rehearing to conform its judgment to an intervening and controlling decision of the Kansas Supreme Court.

OPINIONS BELOW

The Eighth Circuit's decision (App. 1a-23a)[1] is reported at 114 F.3d 697. Its decision denying rehearing (App. 24a) is unreported. The decisions of the district court granting summary judgment in favor of respondents on statute-of-limitations grounds and its related orders (App. 27a-100a) are unreported.

JURISDICTION

The Eighth Circuit entered its judgment on May 13, 1997. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on June 12, 1997 (App. 24a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652, provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the United States, in cases where they apply."

K.S.A. § 60-3201 provides:

> The Kansas supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the intermediate

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[1] References to the Appendix to the Petition for Writ of Certiorari are styled "App. __a."

appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the court of appeals of this state.

STATEMENT OF THE CASE

This case is one of several actions that have been filed by the State of Kansas on behalf of itself and its taxpayers. This case, like the other cases, arises out of huge losses suffered by KPERS (the State's public employees' retirement fund) as a result of alleged fraud and other wrongdoing by respondents and various other defendants. Common to all these cases is the question under Kansas law of whether KPERS must satisfy the general statute-of-limitations periods applicable to claims bought by private parties. As to all cases *except* this case, the Kansas Supreme Court announced the controlling answer in a decision handed down on June 27, 1997: general limitations periods *do not* apply because KPERS' investment function is "governmental" rather than "proprietary" in nature.

Shortly before the Kansas Supreme Court issued this authoritative ruling, precisely the same issue was pending before the Eighth Circuit below, on KPERS' appeal from the district court's dismissal of this case for KPERS' failure to satisfy the general limitations periods for suit by private parties. In its opening brief below, KPERS informed the Eighth Circuit that this very issue had already been fully briefed in the Kansas Supreme Court on an interlocutory appeal. On that basis, KPERS requested that the Eighth Circuit defer to the Kansas Supreme Court, either by certifying this issue to that court or by simply waiting for it to rule. Declining even to comment on KPERS' request, the Eighth Circuit decided the case with unusual haste, ruled against KPERS, and upheld the dismissal of the entire case. Several weeks later, the Kansas Supreme Court ruled in favor of KPERS on this precise issue, establishing the timeliness of all the *other* actions brought by KPERS.

KPERS' efforts to convince the Eighth Circuit to grant rehearing to conform its judgment to the intervening and controlling decision of the Kansas Supreme Court have proved unavailing. The instant petition thus offers this Court an opportunity to further define the architecture of our system of cooperative judicial federalism and, in particular, to strengthen the doctrines governing abstention and certification in a context where the need for deference to state-court proceedings is overwhelming. When a State is a party to a case, we submit, cooperative judicial federalism requires a federal court to defer to the highest court of that State on outcome-determinative issues of that State's own law (either by staying its hand, or by certifying the issue) — *at least* once the federal court is informed that the state court currently has that very issue under consideration.

1. The Kansas State Trial Court's Statute-of-Limitations Ruling

This lawsuit was filed in Kansas state court on June 5, 1991, by the Kansas Attorney General, appearing on behalf of KPERS.[2] KPERS brought suit to recover $65 million, plus interest, that it lost as the result of alleged fraud and other misconduct in connection with its 1986 investment in a Missouri-based savings and loan named Home Savings Association. App. 8a. Named in the suit (either originally or in amended pleadings filed on December 23, 1991) were various respondents, including: the former directors of Home Savings, who allegedly had made fraudulent misrepresentations to KPERS to induce KPERS to make its investment; KPERS' former investment adviser; and its former accounting firm. *Id.* Other respondents were named later. App. 3a-4a, 8a-9a, 28a-30a.

On March 17, 1992, several respondents moved in the Kansas state trial court to dismiss KPERS' claims on statute-of-limitations

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[2] KPERS is "a body corporate and an instrumentality of the State of Kansas." K.S.A. § 74-4903. It is part of a complex state statutory and administrative scheme created "for the purpose of effecting economy and efficiency in the administration of governmental affairs." K.S.A. § 74-4901. It is responsible for administering the pension funds of over 162,000 Kansas public employees through the State Treasurer's office. App. 32a.

grounds, asserting that KPERS had made its Home Savings investment in a proprietary capacity, that the general statutes of limitations therefore applied to KPERS' claims,[3] and that all of KPERS' claims were barred by the two- and three-year statutes of limitations for tort and statutory actions, respectively (K.S.A. §§ 60-512, 60-513).[4] On August 21, 1992, the Kansas state trial court issued an exhaustive opinion rejecting respondents' motion on the ground that, under Kansas law, KPERS had made the Home Savings investment in a governmental capacity, and hence that no statute-of-limitations period applied to KPERS' claims against respondents, so that all of KPERS' claims were timely.[5]

2. The Opposite Statute-of-Limitations Ruling Obtained After Removal of the Case to Missouri Federal Court

After losing this statute-of-limitations motion in the Kansas trial court, respondents did not seek reconsideration or pursue an interlocutory appeal. Instead, through what can most charitably be described as a creative combination of third-party practice and a special removal statute, respondents managed to shift this entire litigation concerning KPERS' investment in Home Savings to a different forum: from state court in Kansas to federal court in Missouri.[6] Once in federal court, respondents moved again to

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[3] Under Kansas common law, a governmental entity such as KPERS is not generally subject to any statute of limitations. *E.g.*, *State ex rel. Stephan v. GAF Corp.*, 747 P.2d 1326 (Kan. 1987). By statute, Kansas has limited this rule to circumstances in which the entity is engaged in a governmental, as opposed to a proprietary, function. K.S.A. § 60-521.

[4] *See KPERS v. Reimer & Koger Associates, Inc.* ("*KPERS IV*"), 77 F.3d 1063, 1065 (8th Cir.), *cert. denied*, 117 S. Ct. 359 (1996).

[5] *KPERS v. Reimer & Koger Associates, Inc.*, No. 91 CV 786 (Dist. Ct. Shawnee County, KS, 7th Div., Aug. 21, 1992), slip op. at 30-31.

[6] On October 2, 1992, several respondents filed a third-party petition against Home Savings' receiver, the Resolution Trust Corporation (RTC), alleging that the RTC had negligently mismanaged Home Savings and had lost money that could have been used to repay part of KPERS' losses; they also sought indemnification under 12 C.F.R. § 545.121. This pleading was

dismiss the litigation as untimely, on this occasion with greater success. Disagreeing with the Kansas trial court's view of Kansas law, the district court held that KPERS' claims are proprietary in character, and hence *are* subject to the general statutes of limitations.[7] Following an interlocutory appeal that resolved the

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ultimately dismissed as unmeritorious for failure to state a claim, *see KPERS v. Reimer & Koger Associates, Inc.*, No. 92-0922-CV-W-9 (W.D. Mo.), Order filed June 13, 1994, ¶¶ 5-7, but not before the RTC predictably invoked 12 U.S.C. § 1441a(*l*)(3)(A) to remove the entire case to the Western District of Missouri, where Home Savings had its principal place of business. Notice of Removal filed Oct. 13, 1992 (W.D. Mo.) (No. 92-0922-CV-W-9).

After the RTC was dismissed from the case, it informed the district court that it had no further interest in the case remaining in federal court. *See* Plaintiff's Supplemental Appendix, *KPERS v. Reimer & Koger Associates, Inc.*, 8th Cir. No. 95-3499, at 2 (statement of RTC's counsel that the RTC had removed the case only "[f]or the purpose of pursuing our motion to dismiss. Once that's accomplished, the [RTC's] motion [to dismiss the third-party complaint] is ruled on, the RTC no longer has a reason or standing to be in the case. That's why we intervened for a limited purpose. The RTC's out of the case, there's no longer basis for federal court jurisdiction and it goes back to state court."). On that basis, KPERS sought remand to the Kansas state courts, or at least that it be allowed to pursue parallel litigation with respect to Home Savings as part of the consolidated Kansas state court litigation. These efforts proved unavailing. *See KPERS v. Reimer & Koger Assocs.*, 4 F.3d 614 (8th Cir. 1993) (*KPERS I*) (affirming district court's refusal to remand), *cert. denied*, 511 U.S. 1126 (1994); *KPERS v. Reimer & Koger Assocs.*, 77 F.3d 1063 (8th Cir.) (*KPERS IV*) (affirming district court's order enjoining filing of parallel litigation), *cert. denied*, 117 S. Ct. 359 (1996).

[7] *See* Hearing of Apr. 28, 1994, in *KPERS v. Reimer & Koger Associates, Inc.*, No. 92-0922-CV-W-9 (W.D. Mo.), Tr. at 40. The district judge noted that KPERS was not subject to the general statutes of limitations "unless the cause of action asserted by KPERS arose out of a proprietary function or activity of KPERS as opposed to a governmental function," *id.* at 20, and observed that Judge Theis had "already ruled" that KPERS' functions were governmental in nature. *Id.* at 26. The district judge noted that Judge Theis had offered an "apparently very well thought out analysis" in his lengthy written opinion of some 64 pages, although the district judge also admitted, quite "frankly," that he "had trouble understanding it." *Id.* at 35. After issuing an oral ruling that covered just one transcript page in reaching a

specific limitations periods applicable under Kansas law on the premise that KPERS' investment function is proprietary in nature,[8] in rulings issued on June 3 and July 25, 1996, the district court held that all of KPERS' claims against all respondents in this case were untimely because they had not been filed within the general limitations periods afforded private parties on the legal claims involved. App. 27a-73a, 80a-96a.

3. The Kansas Supreme Court's Efforts Authoritatively to Resolve the Statute of Limitations Applicable Under Kansas Law to Claims Brought by KPERS

As the district court was issuing its rulings dismissing the claims involving Home Savings that KPERS had been forced to litigate in Missouri federal court, efforts were under way in Kansas to obtain an authoritative determination, for the entire array of litigation involving KPERS' investment activities, of the applicable limitations period for KPERS' claims.

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contrary conclusion, *id.* at 40, the district judge observed: "Now, I think it's appropriate at this point to concede the difference between the decision I just rendered in its length and the decision of Judge Theis." *Id.* at 40-41.

[8] *See KPERS v. Reimer & Koger Assocs.*, 61 F.3d 608, 615 (8th Cir. 1995) (*KPERS III*) (holding that "the Missouri borrowing statute requires the district court to apply the Kansas two- and three-year statutes to KPERS' claims if the claims would be 'fully barred' by these statutes"), *cert. denied*, 116 S. Ct. 915 (1996). KPERS appeared only as appellee at this stage, electing not to seek interlocutory review with respect to the district court's ruling that KPERS' investment function is proprietary within the meaning of Kansas law (in light of the district court's concurrent ruling that all of KPERS' claims against all respondents were timely under a special statute of limitations expressly applicable to KPERS). Thus, the issue of the proper classification under Kansas statute-of-limitations law of KPERS' investment function was not addressed by the Eighth Circuit until it issued the decision below. *See* App. 13a-15a (suggesting that issue might be deemed to have been "decided implicitly" in the prior appeal, but recognizing that it would be a "manifest injustice" to adopt that course if, in fact, KPERS' investment function were governmental, and for that reason reaching merits of the issue).

On April 3, 1996, the Kansas state trial court in charge of the remaining cases brought by KPERS (concerning losses on approximately a dozen other investments) rejected all of defendants' claims that the cases were untimely.[9] Among other rulings, the trial court reaffirmed its earlier analysis that, under Kansas law, KPERS is not subject to the general statutes of limitations, because its investment functions are governmental in nature, not proprietary.[10]

Three of the defendants who were adversely affected by this ruling in the Kansas cases are also respondents in this case. They (along with other defendants) promptly took interlocutory appeals from the Kansas state trial court's ruling in five of the cases pending before it. In light of the importance of the issues, the Kansas Supreme Court *sua sponte* transferred the interlocutory appeals from the intermediate appellate court to its own docket. *KPERS v. Ward*, No. 96-76524-AS (Kan. May 28, 1996). The consolidated appeals were fully briefed by November 1, 1996. On March 5, 1997, the Kansas Supreme Court heard oral argument. Three and a half months later, on June 27, 1997, the court announced its unanimous decision affirming the trial court's ruling that KPERS' underlying investment function is governmental in nature, not proprietary — so that the general statutes of limitations do not apply and the entire array of litigation involving KPERS' investment losses is timely under Kansas law. *KPERS v. Reimer & Koger Associates,* Inc., 1997 WL 374595, at *7-*26 (Kan. 1997).

4. KPERS' Efforts to Convince the Eighth Circuit to Defer to the Kansas Supreme Court on Kansas Law

On several occasions during KPERS' appeal from the district court's statute-of-limitations dismissal of its Home Savings claims,

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[9] Memorandum Opinion and Entry of Judgment, *KPERS v. Reimer & Koger Associates, Inc.*, No. 93 CV 588; *KPERS v. Russell*, No. 93 CV 389; *KPERS v. Ward*, No. 92 CV 433A; *KPERS v. Byrd*, No. 92 CV 923; and *KPERS v. Cohen, Brame & Smith*, No. 92 CV 805 (Dist. Ct. Shawnee County, KS, 7th Div., Apr. 3, 1996).

[10] *Id.* at 4, 18.

KPERS asked the Eighth Circuit to defer to the Kansas Supreme Court's pending consideration of an outcome-determinative issue that the Eighth Circuit had never before considered (see note 8, *supra*): whether or not KPERS' claims are governmental in nature within the meaning of Kansas law, and hence exempted from the general Kansas statutes of limitations.

(a) On December 12, 1996, KPERS filed its opening brief in the Eighth Circuit. KPERS began its argument as follows:

> This appeal concerns issues of Kansas law of first impression that are now before the Kansas Supreme Court in a fully-briefed appeal to which the Reimer & Koger, Shook Hardy and Blackwell Sanders defendants are all party. This Court should certify those issues to the Kansas Supreme Court or refrain from ruling on them until that Court decides the pending appeal.

Brief of Appellant (No. 96-3680) at 25. KPERS summarized the efforts of the parties in the consolidated Kansas litigation, and of the Kansas Supreme Court, to obtain a prompt and authoritative resolution of these issues of first impression, and argued that principles of cooperative judicial federalism required the Eighth Circuit either to certify the issue to the Kansas Supreme Court or to stay its hand pending that court's ruling. *Id.* at 27-29. In an abundance of caution, KPERS also reiterated the arguments made to the Kansas Supreme Court as to why it "is exempt from general periods of limitations under Kansas law because it is a governmental entity engaged in a governmental function." *Id.* at 25; *see also id.* at 29-42.

(b) On January 27, 1997, KPERS filed its reply brief, in which it informed the Eighth Circuit that the Kansas Supreme Court had already scheduled oral argument in the consolidated appeals for March 5, 1997. Reply Brief of Appellant at 1 n.1. KPERS again emphasized the wisdom of "deferring decision" on the appeal until that court resolved the "pending, fully briefed appeal," arguing that any other course "would be abhorrent to the principles of federalism." *Id.* at 1. Further, rebutting appellees' suggestion that the Eighth Circuit could safely move forward because the

proprietary nature of KPERS' investment function was supposedly "settled in Kansas," *id.* at 2, KPERS pointed out that several appellees had conceded the opposite in the Kansas litigation. *See, e.g., id.* at 2.

(c) The Eighth Circuit declined KPERS' request to defer consideration of the case. Instead, on February 24, 1997 — after the Eighth Circuit's calendar of March 1997 arguments had already been distributed to counsel — the court amended its calendar and ordered that oral argument be held three weeks later, on March 13, 1997. *See* Letter of Debbie Heusohn, Asst. Calendar Coordinator, to All Counsel of Record, February 24, 1997. At the March 13 oral argument, KPERS reiterated its request that the Eighth Circuit defer to the impending decision of the Kansas Supreme Court on the controlling issue of Kansas law.

(d) Two months after the oral argument, on May 13, 1997, the Eighth Circuit issued its decision in this case. In a three-paragraph analysis, the Eighth Circuit rejected out of hand KPERS' argument that its underlying investment function involved a governmental function, so that it is exempt from the general Kansas statutes of limitations. *See* App. 13a-15a. The Eighth Circuit opined that "clear holdings" of the Kansas Supreme Court "compel rejection of KPERS' argument." App. 14a. The court's opinion did not address KPERS' repeated requests that, at the very minimum, the Eighth Circuit should defer decision of the case until after the Kansas Supreme Court decided the consolidated appeals on whether KPERS is exempt from the general Kansas statutes of limitations.[11]

On May 23, 1997, KPERS filed a rehearing petition arguing that the Eighth Circuit had ignored vital principles of federalism by failing to defer decision on this key issue even though "the Kansas Supreme Court found the issues so significant that it *sua sponte* transferred the pending appeals from the Kansas Court of Appeals

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[11] The Eighth Circuit did address KPERS' suggestion that various issues of Kansas law, including the applicability of the general statutes of limitations to its investment function, be certified to the Kansas Supreme Court, a course that it declined — again without any reference to the consolidated appeals then pending in the Kansas Supreme Court. App. 14a-15a n.11.

to its own docket."[12] It urged the Eighth Circuit, at the very least, to hold the rehearing petition in abeyance pending the Kansas Supreme Court's decision so that it could readily conform to any contrary decision from the Kansas Supreme Court.[13]

(e) In response, the Eighth Circuit again declined to defer ultimate resolution of the case pending the Kansas Supreme Court's decision in the consolidated appeals. On June 12, 1997, less than three weeks after KPERS filed its rehearing petition, the Eighth Circuit denied the petition without explanation or comment. App. 24a. Two weeks later, on June 27, 1997, the Kansas Supreme Court issued its unanimous decision in the consolidated appeals. It squarely held that, with respect to the array of litigation over KPERS' investment losses, KPERS' investment function *is* governmental in nature, not proprietary, so that KPERS is exempt from the general Kansas statutes of limitations. See p. 7, *supra*. Holding that "the actions of KPERS involved in this litigation are all governmental in character," 1997 WL 374595, at *26, the Kansas Supreme Court stated that the Eighth Circuit's contrary conclusion was premised on a fundamental misunderstanding of Kansas law: the Eighth Circuit had "failed to recognize the distinction between governmental immunity cases and those involving statutes of limitations. It also failed to recognize that there is a significant distinction between a suit by employees to recover contractual benefits and a suit by KPERS arising from its

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[12] Plaintiff-Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc, filed May 23, 1997, at 4-5.

[13] KPERS observed: "Should the Kansas Supreme Court reach a different conclusion on issues of Kansas law from those reached in *KPERS III* and this case, this Court will be obligated to correct its decision to conform it to the decision of the Kansas Supreme Court, even after the time for rehearing has expired and during the pendency of a petition for writ of certiorari. It would be wasteful and inefficient to force KPERS to seek further review of decisions that might well be mooted by an authoritative decision in Kansas simply because this Court reached its decision on issues of Kansas law more quickly than the Kansas Supreme Court." *Id.* at 5-6 (citing *Huddleston v. Dwyer*, 322 U.S. 232 (1944)) (other citations omitted).

investment activities." *Id.* at *23.

(f) On July 16, 1997, KPERS filed a second petition for rehearing, alerting the Eighth Circuit to the Kansas Supreme Court's decision and arguing that the Eighth Circuit was required to conform its judgment to that decision for two independent reasons.[14] First, KPERS argued that such action was necessary in light of the Eighth Circuit's earlier refusal to stay its hand in deference to the consolidated appeals in the Kansas Supreme Court, as a remedy to cure its earlier error.[15] Second, KPERS argued that under a line of authority beginning with *Huddleston v. Dwyer*, 322 U.S. 232, 235-38 (1944), even if KPERS had never apprised the Eighth Circuit of the pending Kansas Supreme Court appeal or requested that it stay its hand, the Eighth Circuit was required to conform its judgment to *any* intervening, controlling decision on a question of state law, as long as the party brings a rehearing petition within the time for petitioning for certiorari.[16]

In this second petition for rehearing, KPERS specifically urged the Eighth Circuit to act promptly to bring its judgment into conformance with the Kansas Supreme Court's recent decision, so as to spare the parties and this Court the burden of a petition for certiorari.[17] KPERS reiterated that request after a month and a half passed without a decision. *See* App. 25a-26a. Near the close of business on September 9, 1997, as this petition was going to press, counsel for KPERS were orally advised by the Clerk's office of the Eighth Circuit that the second petition for rehearing had been denied, without opinion.

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[14] This second petition was accompanied by a motion for leave to file it out of time or, in the alternative, to recall the mandate for the purposes of conforming the Eighth Circuit's decision to the recent decision of the Kansas Supreme Court.

[15] Plaintiff-Appellant's Second Petition for Rehearing and Suggestion for Rehearing En Banc, filed July 16, 1997, at 6-8.

[16] *Id.* at 8-9.

[17] *Id.* at 9.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted for two independent reasons.

I. THIS COURT SHOULD REQUIRE, AS AN ELEMENT OF COOPERATIVE JUDICIAL FEDERALISM, THAT IN FEDERAL LITIGATION INVOLVING A STATE AS A PARTY AND HINGING ON AN UNRESOLVED ISSUE OF THAT STATE'S LAW, FEDERAL COURTS MUST DEFER TO THE CONTEMPORANEOUS CONSIDERATION OF THE ISSUE BY THE HIGHEST COURT OF THAT STATE

This Court should give plenary consideration to this case for the purpose of further defining the basic structure of our system of cooperative judicial federalism. We submit that the Eighth Circuit's treatment of this case reveals the need for this Court to articulate, as an irreducible minimum of any such system, a simple rule or guideline: Where a State is litigating its own claims under its own law in federal court, and where the litigation turns on a state-law issue of first impression, the federal court has an obligation to defer to the highest court of that State on that issue — perhaps in all cases, but *at least* in cases where the federal court is informed that the issue is currently pending before the State's highest court.

Where such deference is due, the federal court may either certify the issue to the state court (if certification procedures are available) or, in an even less burdensome step, simply wait. For a federal court to do *neither*, and simply *ignore* the parallel state court proceeding — as plainly happened here with respect to the Eighth Circuit — is contrary to both this Court's precedents and basic principles of federalism.

As this Court has observed, "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987). Plenary review of the Eighth Circuit's decision refusing to defer to the consolidated appeals before the Kansas Supreme Court, on an issue of Kansas state law of enormous

importance to both the State and its citizens, would be a valuable means of shedding light on the importance of certification and abstention doctrines generally, and of encouraging the lower federal courts to apply them with serious attention to their importance in our federal judicial system. We briefly sketch the doctrinal strands that support both our proposed rule and the value of giving plenary consideration to this case as a means of further articulating the principles of cooperative judicial federalism.

Ever since *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 211-12 (1960), this Court has encouraged the use of certification procedures created by the states and permitting the federal courts to submit issues of state law to the highest court of a State for authoritative decision. Certification, properly employed, has been one of the great success stories in our federal judicial system. Today, at least 43 states provide for certification of state law issues by federal circuit courts. *Hakimoglu v. Trump Taj Mahal Associates*, 70 F.3d 291, 303 (3d Cir. 1995) (Becker, J., dissenting).

As this Court noted early on with respect to the trend toward certification, this device "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Later, in *Belloti v. Baird*, 428 U.S. 132, 150-51 (1976), this Court noted the considerable advantages of certification over abstention, holding that the construction of a Massachusetts statute should have been certified to the Supreme Judicial Court of Massachusetts, and directing the lower court to do so on remand. This Court has from time to time resorted to certification of its own accord.[18]

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[18] *See, e.g., Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978) (decision to "*sua sponte* certify" to Court of Appeals of Maryland the "potentially dispositive" issue of whether certain "aliens have the capacity to acquire Maryland domicile," noting that "the question of who can become a domiciliary of a State is one in which state governments have the highest interest," and observing that "we do not hesitate to avail ourselves" of available certification procedures in such circumstances), *answer conformed to*, 441 U.S. 458 (1979). *See also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395-98 (1988) (state-law issues certified *sua sponte* to state supreme court); *Zant v. Stephens*, 456 U.S. 410, 414-17 (1982) (per curiam) (same),

While this Court did note in *Lehman* that the lower federal courts must be left with a reasonable amount of discretion in deciding on certification, *see* 416 U.S. at 390-91, there is obviously a difference between *principled* and *limitless* discretion.[19] Only a view of *Lehman* as validating the latter concept could support the action of Eighth Circuit in declining to certify in this case.

The Eighth Circuit's failure even to take seriously the possibility of certifying the issue in the case to the Kansas Supreme Court, despite the availability of certification and its clear interest in the issue — demonstrated by its *sua sponte* transfer of the consolidated appeals to its docket — is hardly unique. Judge Calabresi, for example, has recently indicated his belief that "federal courts in general, and [the Second Circuit] in particular, have tended to be far too reluctant to certify questions to the state courts." *McCarthy v. Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997) (Calabresi, J., dissenting). This reluctance to certify, he notes, poses serious risks to our system of cooperative judicial federalism.[20] Judge Becker has expressed similar concerns about

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answer conformed to, 462 U.S. 862, 870-73 (1983); *Aldrich v. Aldrich*, 375 U.S. 249 (1963) (same), *answer conformed to*, 378 U.S. 540, 542-43 (1964).

[19] Thus, the concurring opinion in *Lehman* properly "emphasize[d] the scope of the discretion of federal judges in deciding whether to use such certification procedures," so that, for example, "[i]f a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used." 416 U.S. at 391, 393 (Rehnquist, now C.J., concurring).

[20] *See, e.g.*, *McCarthy*, 119 F.3d at 158-59 ("When federal courts, in effect, prevent state courts from deciding unsettled issues of state law, they violate fundamental principles of federalism and comity. * * * Reluctance to certify is unjust because, as has happened with some frequency, the federal court, having refused to certify, may decide an issue of state law one way, only to discover that the state's highest court, when presented with the issue in a later case, reaches the opposite result. In such a situation, the party who lost in federal court has been unjustly denied her state-law rights, and often has been left with no means of effective redress.") (citations omitted); *id.* at 159

the importance of certification procedures to our system of cooperative judicial federalism.[21]

One particularly grave danger posed by a reluctance to certify in appropriate cases is that state courts will be unable to articulate their own law on unresolved issues in the wide range of cases in which both sides have the choice of forum. As the Seventh Circuit has noted, in such cases a failure to use certification where there is "substantial divergence" over the correct interpretation of state law creates a dynamic that tends to "funnel all similar litigation to federal court." *Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) (en banc) (Easterbrook, J.). The court elaborated:

> If the federal court treats the plaintiff more favorably than the state tribunal would, then the plaintiff always files in federal court; similarly any departure in the [defendant's] favor leads the defendant to remove any suit filed in state court. In either case, the state loses the ability to develop or restate the principles that it believes should govern the category of cases. Certification then ensures that the law we apply is genuinely *state* law.

Id. at 1222 (emphasis in original) (citation omitted). The ability of the States to control the development of their own law, of course,

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n.4 (when "a federal court fails to certify, the highest court of the state is denied the right to decide whether it wishes to resolve the issue. The loser loses because a court that has no ultimate say as to the applicable law has made itself into a court of last resort."). "Wrong" guesses about the proper interpretation of state law are numerous and well documented. *See, e.g.*, Hon. Dolores K. Sloviter, *A Federal Judge Viewed Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1679-81 (1992).

[21] *See Hakimoglu*, 70 F.3d at 302 (Becker, J., dissenting, "enthusiastically" joined on this point by Nygaard and Alito, JJ., *see* 70 F.3d at 293 n.2) (where certification is not used, federal courts end up "making important state policy, in contravention of basic federalism principles."); *id.* at 303 (American Judicature Society survey reports that only 54 percent of the federal circuit judges who responded expressed a willingness to *certify* state law questions, while 80 percent of the state supreme court justices were either "willing" or "very willing" to *answer* certified questions).

has been zealously protected by this Court for over a century. *See, e.g., Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875).

Consistent with the importance of this doctrine, in 1995, the Judicial Conference of the United States adopted a formal recommendation endorsing procedures for submission of novel or difficult state law questions to the state courts. *Hakimoglu*, 70 F.3d at 303 & n.13 (Becker, J., dissenting). Indeed, some circuits have promulgated rules to govern the exercise of certification, *see* 2d Cir. I.O.P. § 0.27; 7th Cir. R. 52; 10th Cir. R. 27.1, and in some circuits categorical rules requiring certification of doubtful state-law issues are mandated or at least advocated.[22] Granting plenary review in this case to examine the need for certification in a situation such as that faced by the Eighth Circuit below would help focus attention on the broader need to resort to certification in a range of circumstances and provide more uniformity nationwide.

Of course, given the procedural background here, it would not be necessary for this Court to mandate certification in order to rule for KPERS. Here, there was an easy alternative to certification — one that the Eighth Circuit did not even *mention*, even though KPERS repeatedly urged it. That was simply to *wait*: to decline to issue a ruling in the case until the Kansas Supreme Court acted. This Court's decision in *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593 (1968), is controlling on this point. In that case, involving

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[22] Under Eleventh Circuit precedent, for example, "[w]here there is *any doubt* as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary *Erie* 'guesses' and to offer the state court the opportunity to interpret or change existing law." *Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 52 F.3d 913, 916-17 (11th Cir. 1995) (emphasis added). Judge Calabresi has recently suggested a more modest categorical rule for certification — still much broader than would be required to rule for KPERS in this case, but nonetheless illustrative: "[F]ederal courts must be careful to certify only in appropriate cases. But 'appropriate' must mean virtually any case in which 1) a significant and dispositive issue of state law is in genuine doubt . . ., and 2) certification is specifically requested by the party that did not invoke federal court jurisdiction. By such a standard, I believe that certification is not used enough." *McCarthy*, 119 F.3d at 161 (citations omitted).

only private parties, the federal courts insisted on adjudicating the issue of whether the defendant was liable for trespass under state law. That issue turned entirely on whether the defendant's use of the plaintiff's water was an exercise of private eminent domain, in violation of the "public use" clause of the state constitution.

The Tenth Circuit held that the use of the water *did not* violate the state's "public use" clause. This Court reversed on the basis that the Tenth Circuit should never have ruled on the issue once it learned that this very issue was under consideration by the state courts:

> The Court of Appeals erred in refusing to stay its hand. The state law issue which is crucial to this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources. The issue, moreover, is a truly novel one. The question will eventually have to be resolved by the New Mexico courts, and since a declaratory judgment action is actually pending there, in all likelihood that resolution will be forthcoming soon. Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource.

Id. at 594. Once the declaratory judgment action reached the New Mexico Supreme Court, that court disagreed with the Tenth Circuit, holding that the use of the water *did* violate the "public use" clause of the state constitution. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 467 P.2d 986 (N.M. 1970).[23]

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[23] For other important cases requiring federal court deference on matters of particular importance to a State, *see, e.g.*, *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1072-75 (1997); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27-30 (1959); *Burford v. Sun Oil Co.*, 219 U.S. 315, 331-34 (1943).

II. AT MINIMUM, THIS COURT SHOULD GRANT THE PETITION, VACATE THE JUDGMENT, AND REMAND TO THE EIGHTH CIRCUIT FOR FURTHER CONSIDERATION IN LIGHT OF THE INTERVENING DECISION OF THE KANSAS SUPREME COURT

Two weeks after the Eighth Circuit denied KPERS' first rehearing petition — leaving in place its judgment dismissing as untimely under Kansas law the entirety of KPERS' lawsuit to recover public funds amounting to some $65 million — the Kansas Supreme Court decided its consolidated appeals in all the *other* cases brought by KPERS. See p. 7, *supra*. That Kansas Supreme Court decision, of course, established beyond any doubt the incorrectness of the Eight Circuit's decision; indeed, the Kansas Supreme Court explicitly pointed out where the Eighth Circuit had erred under Kansas law. See pp. 10-11, *supra*.

The Kansas Supreme Court's decision makes quite concrete the risk posed when a federal court overseeing litigation involving substantial state interests and uncertain issues of state law ignores its obligation to defer to parallel state-court litigation in which those state-law issues are being clarified. The issues identified in Part I of this petition, which would themselves be worthy of plenary review even if the Kansas Supreme Court had not yet ruled in the consolidated appeals, are even more clearly worth a grant of certiorari in light of the stark contrast that has ultimately resulted between the decisions of the Eighth Circuit and the Kansas Supreme Court on precisely the same Kansas law statute-of-limitations issue.

But if this Court were not otherwise inclined to grant plenary review of this case to address the issues we have presented, it should at the very minimum grant the petition, vacate the judgment below, and remand for further consideration in light of the Kansas Supreme Court's intervening decision. This Court regularly grants such relief where necessary to ensure that federal judgments not yet final conform to controlling state law. Just last Term, for example, seven members of the Court endorsed "our 'longstanding practice' of vacating a court of appeals' decision based on a construction of state law that appears to contradict a recent decision of the highest

state court." *Lords Landing Village Condominium Council v. Continental Ins. Co.*, 117 S. Ct. 1731, 1732 (1997) (per curiam) (quoting *D.L. Thomas v. American Home Products, Inc.*, 117 S. Ct. 282, 283 (1996) (Scalia, J., concurring)).[24]

This practice is important to the basic principles of judicial federalism because it enables a lower federal court to correct its misunderstanding of state law and to bring that understanding in line with that of the state supreme court, the final arbiter of that law — just as this Court's use of the GVR mechanism in cases related to those it has decided on the merits fulfills that function with regard to this Court's pronouncements on federal law.[25] As Justice

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[24] *See, e.g., D.L. Thomas v. American Home Products, Inc.*, 117 S. Ct. 282 (1996); *National Union Fire Ins. Co. v. American Medical International, Inc.*, 116 S. Ct. 510 (1995); *Chew-Villasana v. INS*, 506 U.S. 910 (1992); *Exxon Co., U.S.A. v. Banque de Paris et des Pays-Bas*, 488 U.S. 920 (1988); *Mullaney v. Wilbur*, 414 U.S. 1139 (1974); *Lucas v. Rivers*, 414 U.S. 896 (1973); *Blabon v. Nelson*, 393 U.S. 20 (1968) (per curiam); *Collins v. Commissioner*, 393 U.S. 215 (1968); *Blaauw v. Grand Trunk Western R. Co.*, 380 U.S. 127 (1965) (per curiam); *Conner v. Simler*, 367 U.S. 486 (1961) (per curiam); *Nolan v. Transocean Air Lines*, 365 U.S. 293 (1961) (per curiam); *Johnson v. Union Pacific R. Co.*, 352 U.S. 957 (1957) (per curiam); *Downey v. Beck*, 343 U.S. 912 (1952). *See also* Note, *The Supreme Court, 1960 Term*, 75 Harv. L. Rev. 40, 95-96 (1961) ("Another phase of the Court's remand 'in light of' device is that in which further consideration is directed to a state court decision made subsequent to the lower court's decision. Such cases generally involve diversity actions") (footnotes omitted).

[25] *See Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944) ("a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones."); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941) ("[T]he dominant principle is that *nisi prius* and appellate tribunals alike should conform their orders to the state law as of the time of entry. * * * [U]ntil such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court. Any other conclusion would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law.") (footnote omitted).

Scalia has observed:

> In both instances, we are vacating the decision below to allow the court of appeals to consider an intervening decision of the court that is the final expositor of a particular body of law . . . . We assuredly would not decline to GVR a case affected by one of our own intervening decisions merely because the case "is of no general importance beyond the interest of the parties." *Post*, at 285. Almost all of our GVR's fit this description . . . . I can think of no possible reason why we would routinely GVR "unimportant" cases in light of our own opinions but not in light of state supreme court opinions, unless, of course, we have less regard for the federal courts' correct application of state law than for their correct application of federal law — an attitude we should certainly not acknowledge.

D.L. Thomas, 117 S. Ct. at 283 (Scalia, J., concurring) (citations omitted).

Further, it is worth noting that the basis for such relief in this context is far more substantial here than in a case like *D.L. Thomas*; indeed, this would appear to be one of the "exceptional cases with importance beyond the parties' particular dispute" that even the dissenters in *D.L. Thomas* suggested might merit use of the GVR mechanism. *Id.* at 284 (Rehnquist, C.J., joined by Breyer, J., dissenting). Through its instrumentality, KPERS, the State of Kansas has brought this lawsuit on behalf of itself and its taxpayers, to recover $65 million, plus interest, allegedly lost because of wrongdoing by respondents. As the Kansas Supreme Court has noted, many Kansas taxpayers will be affected by the outcome of this and other lawsuits brought by KPERS.[26] Thus, this case is

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[26] *See, e.g.*, 1997 WL 374595, at *24-*25 ("KPERS is seeking to recover millions of dollars which the public will otherwise be forced to pay in higher taxes. * * * "[T]he KPERS cases . . . clearly [involve] the investment of tax dollars necessary to satisfy contractual obligations of governmental bodies. Again, this is a governmental function.").

vastly more important than a case brought by a private party; the substantial interest of the State of Kansas and its citizens deserves particular attention in the assessment of GVR relief.

Further, here, unlike in *D.L. Thomas*, the court of appeals was given ample opportunity to defer to the highest court of the relevant State, but simply chose to ignore the federalism concerns that KPERS repeatedly pressed on it. (By contrast, in *D.L. Thomas* the intervening state supreme court decision was not anticipated by either party and came without warning; there was no course of conduct by the court of appeals demonstrating a lack of deference due to state courts.) Finally, here there is every indication that respondents benefitted by the erroneous federal court determination of Kansas law. Respondents engaged in forum-shopping precisely in hopes of obtaining such a ruling: only *after* losing on the statute-of-limitations issue in the Kansas state trial court did they resort to the third-party motion practice that brought them into federal court, enabling them to file, and to prevail on, a new statute-of-limitations motion. See pp. 4-6 and notes 6 & 7, *supra*.[27]

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[27] Respondents may contend (as they did below in response to our second request for rehearing) that bringing the Eighth Circuit's decision into conformance with the recent decision of the Kansas Supreme Court would not affect the ultimate outcome of this case because the operative limitations period, under the Eighth Circuit's previous decision regarding the effect of the Missouri borrowing statute, *see KPERS III*, 61 F.3d at 611-14, would *then* become the five-year Missouri statute of limitations, which some respondents assert has run with respect to the claims against them. There are a variety of reasons why this argument is without merit as a basis for denying the requested relief, among them: (1) the question of the effect, if any, of Missouri's limitations period on the record of this case has yet to be addressed by either of the lower courts; (2) in the wake of the reversal of the district court's erroneous ruling that KPERS' investment function is proprietary, KPERS would have new grounds on which to attack the Eighth Circuit's earlier hypothetical rulings with regard to the possible applicability of the Missouri five-year statute of limitations; (3) even if the five-year Missouri limitations period were applicable, KPERS would meet it on this record; and (4) it is by no means clear that the legal consequences of a decision based on the Missouri statute of limitations would be the same as the legal consequences of a decision based on the Kansas statute of limitations.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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September 10, 1997

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 96-3262

Kansas Public Employees Retirement System,
Plaintiff —Appellant,

v.

Blackwell, Sanders, Matheny, Weary & Lombardi, L.C., a law partnership; William H. Sanders, Sr., individually and as the representative of a defendant class,
Defendants —Appellees.

No. 96-3317

Kansas Public Employees Retirement System,
Plaintiff —Appellant,

v.

Reimer & Koger Associates, Inc., a Kansas Corporation; Ronald Reimer, an individual; Kenneth H. Koger, an individual; Clifford W. Shinski, an individual; Brent Messick, an individual; Robert Crew, an individual; Sherman Dreiseszun, an individual; I. I. Ozar, an individual; Frank Sebree, an individual; Peat, Marwick, Mitchell & Co., an accountancy firm; KPMG Peat Marwick, an accountancy firm; Robert Spence, an individual; Thomas S. Morgan, co-executor of the estate of Frank S. Morgan; Marilyn J., co-executor of the estate of Frank Morgan,
Defendants —Appellees,

Shook, Hardy & Bacon, through C. Patrick McLarney, acting as a representative of an agreed upon class of partners in Shook, Hardy & Bacon, and for Shook, Hardy & Bacon P.C.,
Intervenor Defendant —Appellee.

Kansas Public Employees Retirement System,
Plaintiff —Appellant,

v.

Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.,
a law partnership; William H. Sanders, Sr., individually
and as the representative of a defendant class,
Defendants —Appellees.

No. 96-3680

Kansas Public Employees Retirement System,
Plaintiff —Appellant,

v.

Reimer & Koger Associates, Inc., a Kansas Corporation;
Ronald Reimer, an individual; Kenneth H. Koger, an individual;
Clifford W. Shinski, an individual; Brent Messick, an individual;
Robert Crew, an individual; Sherman Dreiseszun, an individual;
I. I. Ozar, an individual; Frank Sebree, an individual;
Peat, Marwick, Mitchell & Co., an accountancy firm,
Defendants,

KPMG Peat Marwick, an accountancy firm;
Robert Spence, an individual,
Defendants —Appellees,

Thomas S. Morgan, co-executor of the estate of Frank S. Morgan;
Marilyn J., co-executor of the estate of Frank Morgan,
Defendants,

Shook, Hardy & Bacon, through C. Patrick McLarney, acting
as a representative of an agreed upon class of partners in
Shook, Hardy & Bacon, and for Shook, Hardy & Bacon P.C.,
Intervenor Defendant.

Submitted: March 13, 1997

Filed: May 13, 1997

Before McMILLIAN, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Kansas Public Employees Retirement System, known as KPERS, appeals from the district court's[1] entry of an adverse summary judgment in its case against its investment advisers,[2] accountants,[3] lawyers,[4] one of its own trustees,[5] and the former directors[6] of Home Savings Association, arising out of KPERS's investment in Home Savings, a failed thrift institution. In an earlier appeal, we held that

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[1] The Honorable D. Brook Bartlett, Chief Judge, United States District Court for the Western District of Missouri.

[2] The investment advisor defendants are Reimer & Koger Associates, Inc., and a number of individuals associated with Reimer & Koger: Kenneth H. Koger, Ronald Reimer, Clifford W. Shinski, Robert Crew and Brent Messick.

[3] The accountant defendants are KPMG Peat Marwick and Robert W.L. Spence, a partner in Peat Marwick.

[4] The lawyer defendants are Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.; its partner William H. Sanders, Sr.; Shook, Hardy & Bacon, P.C.; and Shook, Hardy & Bacon, a class of partners. A Shook Hardy partner, Frank P. Sebree, is joined both in his capacity as a lawyer and as a Home Savings director.

[5] Michael Russell was a trustee of KPERS and a defendant in this case. The court entered summary judgment for Russell on March 4, 1997, and KPERS appealed. KPERS moved to stay argument of this case so that the appeal could be consolidated with this appeal. We denied that motion. Order of March 11, 1997.

[6] The Home Savings defendants are the Estate of Frank Morgan, Sherman Dreiseszun, I. I. Ozar, and Frank P. Sebree.

KPERS's claims were not governed by a ten-year Kansas statute of limitation, but that Missouri choice of law provisions controlled. *KPERS v. Reimer & Koger Assocs.*, 61 F.3d 608 (8th Cir. 1995) (*KPERS III*), *cert. denied*, 116 S. Ct. 915 (1996). Under the Missouri borrowing statute, KPERS's claims are barred if they would be untimely under the two- and three-year statutes provided by Kansas law. *Id.* We remanded to the district court to determine whether KPERS's claims were barred by the Kansas statutes. The district court held that KPERS's claims are time-barred under Kansas law.[7] KPERS argues that the court should not have applied the Kansas statutes of limitation to KPERS's claims, because its claims are exempt from all statutes of limitation. Further, KPERS argues that, even if the claims are subject to the statutes of limitation, the district court erred in applying the statutes of limitation to the facts of this case, specifically that it misconstrued Kansas law concerning when a cause of action accrues, overlooked disputed fact issues, and failed to consider all of KPERS's claims against its accountants. We affirm the judgments of the district court.

KPERS is the pension fund for certain employees of the state of Kansas. In 1983 Governor John Carlin began to promote the use of KPERS money to stimulate the Kansas economy. KPERS's investment consultants, Callan Associates, Inc., advised KPERS in 1983 that investing public pension fund moneys as venture capital to promote regional business would be a high-risk undertaking. Callan advised KPERS not to embark on such a program, but to stick to "more traditional investments." Carlin appointed a Kansas City businessman, Michael Russell, to KPERS's board of trustees. Russell became chairman of KPERS's board in August 1985. Russell was a friend and business associate of Kansas City banker Frank Morgan.

In 1985, KPERS established a special "Kansas Investment Fund" to make direct investments in Kansas ventures. About the same time, Morgan and his uncle, Sherman Dreiseszun, bought Home Savings,

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[7] *KPERS v. Reimer & Koger Assocs., Inc.*, No. 92-0922-CV-W-9 and No. 95-0819-CV-W-9 (W.D. Mo. June 3, 1996); *KPERS v. Reimer & Koger Assocs., Inc.*, No.92-0922-CV-W-9 (W.D. Mo. July 25, 1996). The court also denied KPERS's motion to amend its Sixth Amended Complaint. *KPERS v. Reimer & Koger Assocs., Inc.*, No. 92-0922-CV-W-9 (W. D. Mo. Aug. 5, 1996).

an ailing thrift institution based in Kansas City. As part of the acquisition, Morgan and Dreiseszun entered into an agreement with the Federal Home Loan Bank Board in which they agreed that Home Savings would not engage in transactions with other banks affiliated with Morgan and Dreiseszun. Because Morgan and Dreiseszun were the "standby purchasers" of Home Savings stock, this agreement is known as the "standby purchaser agreement." Russell became a member of the Home Savings board of directors. He and his businesses had borrowed large amounts from Home Savings.

KPERS conducted its investments through outside investment advisors, one of which was Reimer & Koger. Relations between KPERS and Reimer & Koger were governed by a Special Investment Advisory Services Agreement, which incorporated the "prudent man" standard for investing KPERS's money. After Russell became chairman of KPERS's board, Frank Morgan invited Reimer & Koger's principal, Kenneth Koger, to invest $25 million of KPERS's money in Home Savings. Koger only had authority to invest $15 million of KPERS's money without board approval, but on December 31, 1985, Koger committed to invest that amount in Home Savings subordinated debentures. Koger noted in a memo sent to KPERS's executive secretary that Russell was on Home Savings's board and that "something would have to be done about that." Accordingly, Russell resigned from Home Savings's board on February 12, 1986. Koger then invested KPERS's $15 million in Home Savings subordinated debentures on May 2, 1986. Reimer & Koger retained Blackwell Sanders to do the legal work for this investment. As counsel for Home Savings, Frank Sebree of Shook Hardy issued an opinion of counsel in connection with the investment, stating that to the "best of our knowledge and belief, the Association is not in violation of . . . any agreement, instrument, judgment, decree, order, statute, rule or governmental regulation applicable to it."

Morgan next approached Koger about investing $50 million in Home Savings. Because this investment exceeded Koger's investment authority, Koger had to go to the KPERS board for permission to make the investment. On June 6, 1986, Koger wrote a letter to Russell proffering the $50 million investment; Koger's letter stated that the purpose of the investment would be to finance Home Savings's acquisition of a $1 billion St. Louis savings and

loan. Russell telephoned the other members of the KPERS board to obtain approval of the investment, and the trustees voted in favor of the investment. In June 1986 Home Savings bid on the St. Louis savings and loan. By the fall of 1986, Home Savings knew it had lost the bid. On September 30, 1986, because the parties were not prepared to close on the debentures, KPERS invested in Home Savings short term promissory notes; the notes were exchanged for subordinate debentures of Home Savings on October 24, 1986. As part of the issuance of the debentures, Sebree again issued an opinion of counsel to KPERS in which he stated that Home Savings was not in violation of any agreement or regulation to his knowledge. However, in actuality, Home Savings had been cited by the bank examiners in its most recent examination for excessive investment in a subsidiary corporation.

On November 13, 1986 the *Kansas City Star* reported that KPERS had made the $50 million investment in Home Savings. The article quoted Koger as saying that Home Savings had considered buying an unnamed St. Louis savings and loan, but that Home Savings had "pretty much dropped [that acquisition] from consideration."

On December 21, 1986 the *Kansas City Star* published a lengthy investigative article entitled: "Kansas pension fund ventures raise questions of conflict." The article revealed that Russell had not only been on the Home Savings's board, but that shortly after the $ 50 million subordinated debenture purchase, one of Russell's businesses had obtained a $ 40 million loan from another Morgan bank. The article quoted interviews with Koger, Russell, and several other KPERS board members about whether there was a conflict of interest because of Russell's directorship and loans.

As a result of the *Kansas City Star* article, the Kansas Attorney General, Robert Stephan, undertook an investigation of the possible Russell conflict. Stephan issued a report on March 4, 1987, concluding that Russell had not violated the Kansas ethics law, Kan. Stat. Ann. § 46-233, by virtue of his Home Savings directorship because the amount of money Russell made as a director was below the $ 2,000 amount specified in the Kansas statute as a "substantial interest," Kan. Stat. Ann. § 46-229, and because Russell had resigned from the directorship by the time of the KPERS investments. Therefore, the Attorney General's report concluded that

the Kansas ethics statute did not bar Russell from participating in the making of the Home Savings investment. The Attorney General further considered whether Kansas ethics laws were "appropriate" to protect the fund. The Attorney General determined that KPERS was adequately protected by the requirement that KPERS board members exercise "the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs." He stated: "An attempt to restrict the board any further than this in their investment decisions may prove detrimental to the program." Further, he noted that "borderline conflict situations" were perhaps an inevitable result of the "desirable" practice of having "successful businessmen" on the board. Stephan's report did not discuss Russell's loan from the other Morgan bank.

In December 1987 the KPERS $ 50 million was reinvested in more Home Savings subordinated debentures. In connection with the reissue, Sebree again issued an opinion stating that Home Savings was not, to his knowledge, in violation of any law, agreement, or regulation. However, Home Savings's last examination report stated that Home Savings had violated the standby purchasers agreement by buying loans from affiliated banks and had violated federal regulations by excessive investment in a subsidiary.

By May 1988, the bank examiners' criticisms of Home Savings's affiliate transactions, conflicts of interest, and problem loans had become more urgent. The *Kansas City Business Journal* reported in September 1988 that Home Savings had been criticized by the examiners in its last examination for affiliate transactions and under capitalization. As part of an effort to provide Home Savings with sufficient capital to meet the regulatory requirements, KPERS converted its debentures into preferred stock on March 29, 1990.[8] In 1991, the regulators closed Home Savings and appointed the RTC as receiver. KPERS lost its entire $ 65 million in principal, though it had earlier received some $ 29 million in interest payments.

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[8] KPERS agrees that its ultimate recovery following the regulatory takeover was not affected by the conversion of its investment from debt to equity. Dist. Ct. Order of June 3, 1996 at 36.

Peat Marwick had audited KPERS annually from 1983 to 1988. Because the direct placement investments were difficult to value, KPERS adopted a policy of carrying those investments on its books at cost, minus any *permanent* impairment. KPERS's investment managers, such as Reimer & Koger, were responsible for reporting to KPERS when they determined an investment was permanently impaired. The investment advisers were compensated according to the amount of money they were handling for KPERS, which meant that they reduced their compensation when they reported an impairment. Peat Marwick warned KPERS in 1987 and 1988 that its direct placement investments were partially impaired and that it needed to establish an investment allowance account to protect it against impairments. Peat Marwick reported to KPERS's in-house accountants in 1987 and 1988 that KPERS had impaired direct placement investments of $ 10 million and $ 19 million respectively. Peat Marwick nevertheless issued unqualified opinions despite the impairments. Peat Marwick's successor auditor, Baird, Kurtz & Dobson, recognized in the 1989 audit that KPERS's direct placement losses could be as high as $ 75 million; in response to this report, KPERS set up an investment allowance account and also wrote down its direct placement investments by $ 27 million. Reimer & Koger did not write down KPERS's $ 65 million investment until March 15, 1991, the day Home Savings was placed in receivership.

KPERS initially filed its case on June 5, 1991 in the state courts of Kansas against the Reimer & Koger defendants. On December 23, 1991, KPERS added the Home Savings defendants, the Peat Marwick defendants, and Russell. The Home Savings defendants impleaded the Resolution Trust Corporation, receiver for Home Savings. The RTC had the power under FIRREA, 12 U.S.C. § 1441a(1)(3) (1994), to remove the case to the Western District of Missouri, which it did. KPERS moved to remand the case to the Kansas court, but the district court denied its motion, and we affirmed in *KPERS v. Reimer & Koger Assocs.*, 4 F.3d 614 (8th Cir. 1993) (*KPERS I*), *cert. denied*, 511 U.S. 1126 (1994).

After KPERS advised the two law firms, Blackwell Sanders and Shook Hardy, that it intended to sue them in Kansas, both firms moved to intervene in this case. The court granted Shook Hardy's motion to intervene, but denied permission to Blackwell Sanders. However, we reversed, permitting Blackwell Sanders to intervene as

well. *KPERS v. Reimer & Koger Assocs.*, 60 F.3d 1304 (8th Cir. 1995) (*KPERS II*). KPERS sued Blackwell Sanders in Kansas state court on January 6, 1995. Blackwell impleaded the RTC, which removed the case to the Western District of Missouri.

KPERS's complaint (by now, its Sixth Amended Complaint) is pleaded in fifteen counts and asserts a variety of theories, including common law fraud, statutory securities fraud, various breaches of fiduciary and professional duties, negligence, breach of contract, and civil conspiracy. There are a few crucial factual allegations relevant to most of the different legal theories. First, KPERS alleges that the Home Savings defendants and Reimer & Koger misrepresented that Home Savings would use KPERS's $50 million investment to buy a $1 billion St. Louis savings and loan. KPERS alleges that Home Savings actually knew when it received the $50 million that it would not use the money to buy the St. Louis savings and loan, because Home Savings needed the money to raise its capital level to the regulatory minimum. KPERS alleges Reimer & Koger knew the money would not be so used, but failed to tell KPERS. KPERS alleges that Russell told the other KPERS trustees that the money would be used to buy the St. Louis savings and loan. Second, KPERS alleges that Sebree issued opinion letters on behalf of Home Savings saying that Home Savings was not in violation of any governmental regulation or agreement, when in fact Home Savings was in violation of the standby purchaser agreement it had entered with the Federal Home Loan Bank Board and had excessive investments in one of its subsidiaries. Third, KPERS alleges that the Home Savings defendants made several statements about the quantum of risk in their lending portfolio, and that these statements were false because the credit risk was much higher due to high risk transactions done to benefit other Morgan banks. Similarly, KPERS claims Reimer & Koger and Blackwell Sanders failed to advise KPERS of the high-risk nature of the Home Savings investment. Fourth, KPERS alleges that Russell made false statements to the other KPERS trustees in order to procure KPERS's money for Home Savings so that Home Savings's affiliates would, in turn, lend him $40 million. KPERS claims that the Home Savings defendants, Shook Hardy, Blackwell Sanders and Reimer & Koger participated in Russell's breach of duty by failing to reveal Russell's conflicts of interest to KPERS. Finally, KPERS alleges the Peat Marwick defendants'

failure to identify and write off impaired investments caused KPERS to overvalue its investment in Home Savings and prevented it from discovering the wrongdoing of other defendants and from taking action to stop its losses.

The Home Savings defendants moved for summary judgment on the grounds that KPERS's claims were time-barred. The district court determined that Kansas choice of law rules should govern the choice of limitations law and that the applicable Kansas period was provided by a ten-year statute enacted especially to govern civil actions brought by KPERS, Kan. Stat. Ann. § 60-522 (1994). In an interlocutory appeal, we reversed, holding that Missouri choice-of-law rules governed, and that the ten-year Kansas statute did not purport to revive barred claims. *KPERS III*, 61 F.3d at 615. In *KPERS III* we held that "the Missouri borrowing statute requires the district court to apply the Kansas two- and three-year statutes [Kan. Stat. Ann. §§ 60-513(a) and 60-512] to KPERS' claims if the claims would be 'fully barred' by these statutes (a finding of fact which has not been made)."[9] *Id.* We remanded for the district court to determine whether KPERS's claims were barred by these statutes. *Id.*

On remand, all the defendants moved for summary judgment on the grounds that KPERS's claims were barred by the Kansas two-year tort statute, Kan. Stat. Ann. § 60-513(a) (1996 Cum. Supp.), and the Kansas three-year statute for statutory claims, Kan. Stat. Ann. § 60-512 (1994). The district court held that the defendants were entitled to summary judgment on the ground that KPERS's claims were time-barred. Orders of June 3, 1996 (Home Savings defendants, law firm defendants, and Reimer & Koger defendants), July 25, 1996 (Peat Marwick defendants); and March 4, 1997 (Russell). The court also denied KPERS's motion to amend its Sixth Amended Complaint to add a breach of contract claim against

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[9] KPERS has also appeared before us in matters arising out of the same underlying case, but not directly relevant to the issues here. In *KPERS v. Reimer & Koger Assocs.*, 77 F.3d 1063 (8th Cir.) (*KPERS IV*), *cert. denied*, 117 S. Ct. 359 (1996), we affirmed a district court order enjoining KPERS from prosecuting suits in Kansas state court based on the same claims being litigated in this case. In *In re KPERS*, 85 F.3d 1353 (8th Cir. 1996) (*KPERS V*), we denied KPERS's petition for writ of mandamus directing the district judge to recuse himself.

the Peat Marwick defendants. Order of August 5, 1996.

The district court first considered the summary judgment motion of the Reimer & Koger defendants. The court concluded that, even though KPERS pleaded one of its claims as a breach of the Special Investment Advisory Services contract, the Kansas two-year tort statute would apply to all KPERS's claims against Reimer & Koger, because KPERS's contract did not call for a specific result, but simply required discharge of duties imposed by law by virtue of the contract. Order of June 3, 1996, slip op. at 43-45 (citing *Hunt v. KMG Main Hurdman*, 17 Kan. App. 2d 418, 839 P.2d 45, 47 (Kan. Ct. App. 1992)).

Therefore, the court held that KPERS's claims against the Reimer & Koger defendants would be barred if they had accrued before June 5, 1989, two years before KPERS filed suit against the Reimer & Koger defendants. *Id.* at 45. Under Kansas law, the statute of limitation would begin to run at the time it was reasonably ascertainable that the plaintiff had suffered an injury caused by the defendant's wrongdoing. *Id.* at 46 (citing *Dearborn Animal Clinic, P.A. v. Wilson*, 248 Kan. 257, 806 P.2d 997 (Kan. 1991)). The court held that the evidence showed the KPERS board of trustees had actual knowledge before June 5, 1989, of the facts KPERS now alleges Reimer & Koger failed to tell KPERS about: that Home Savings was no longer planning to use KPERS's $50 million to buy the St. Louis savings and loan; that Russell was a director of Home Savings and borrowed money from another Morgan bank; and that Home Savings was engaged in risky real estate and commercial lending. 839 P.2d 45 at 47-48, 52.

Alternatively, the court held that even if the KPERS board did not have actual knowledge about these things, Reimer & Koger's knowledge could be imputed to KPERS because Reimer & Koger was KPERS's agent and an agent's knowledge can be imputed to its principal. *Id.* at 49-50.

The court also rejected KPERS's argument that Reimer & Koger concealed the facts from KPERS and therefore the statute should be tolled. The court held that no reasonable finder of fact could conclude that Reimer & Koger intentionally concealed information from KPERS. *Id.* at 54.

The court held that the same knowledge that caused KPERS's claims against Reimer & Koger to accrue before June 5, 1989 would

also bar its common law tort claims against the Home Savings defendants, which were filed several months later than the claims against the Reimer & Koger defendants. *Id.* at 60. KPERS also sued the Home Savings defendants for statutory securities fraud, which has a three-year statute of limitation, Kan. Stat. Ann. § 60-512; *see Kelly v. Primeline Advisory, Inc.*, 889 P.2d 130, 134 (Kan. 1995). The court held that KPERS had knowledge of the key facts by December 23, 1988, which meant that its statutory claims against the Home Savings defendants were also barred. Order of June 3, 1996, slip op. at 61.

The claims against Shook Hardy and Blackwell Sanders were even more obviously barred, since Shook Hardy did not move to intervene until October 14, 1994, *id.* at 64, and KPERS did not sue Blackwell Sanders until January 6, 1995, *id.* at 67. The same facts relevant to the claims against the other defendants barred KPERS's suits against these two law firms long before the suits were brought. *Id.* at 64-65, 69.

In a separate order, the court held that the claims against the Peat Marwick defendants were barred by the two-year statute of limitation. KPERS claims Peat Marwick misled it by signing off on audits of KPERS without advising KPERS that its Home Savings investments were impaired or that it should establish an investment allowance account. The court pointed to a number of facts that would cause the statute to begin running before December 23, 1989, including the fact that Peat Marwick stated in its 1987 and 1988 auditor's reports that some of KPERS's direct placement investments were impaired and recommended that KPERS establish an investment allowance account. Order of July 25, 1996, slip op. at 21. Moreover, by September 30, 1989, after an audit by a new auditor, Baird, Kurtz & Dobson, KPERS established an investment allowance account and wrote off a portion of its direct placement investments. *Id.* at 22.

I.

KPERS makes threshold legal arguments that its claims are not subject to any statute of limitation.

We review a grant of summary judgment de novo. *See Uhl v. Swanstrom*, 79 F.3d 751, 754 (8th Cir. 1996). Summary judgment is proper when there is no genuine issue of material fact and the

moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). We also review de novo the district court's determination of questions of state law. See Salve Regina College v. Russell, 499 U.S. 225, 231 (1991).

In *KPERS III* we held that Missouri limitations law governed this case and that under Missouri's borrowing statute the Kansas two- and three-year statutes of limitation applied to KPERS's claims if those statutes fully barred the claims. 61 F.3d at 614-16. The law of the case doctrine prevents the relitigation of a settled issue in a case and requires courts to adhere to decisions made in earlier proceedings. *See Little Earth of the United Tribes, Inc. v. United States Dep't of Hous. & Urban Dev.*, 807 F.2d 1433, 1441 (8th Cir. 1986). The law of the case doctrine applies to issues decided implicitly as well as those decided explicitly. *Id.* at 1438. We are satisfied that the law of the case doctrine prevents KPERS from relitigating the issue of whether these statutes apply to its claims. *See United States v. Duchi*, 944 F.2d 391, 392-93 (8th Cir. 1991). We recognize that the law of the case doctrine does not apply when it results in a manifest injustice, and therefore we briefly discuss the merits of KPERS's arguments for exemption from the statutes of limitation.

A.

KPERS argues that its investment in Home Savings was a governmental function, and therefore, its claims arising out of that investment are not subject to any statute of limitation.

The Kansas Supreme Court has stated that "maintaining KPERS is a proprietary function of the state." *In re Midland Indus.*, 237 Kan. 867, 703 P.2d 840, 843 (Kan. 1985) (discussing the holding of *Shapiro v. KPERS*, 216 Kan. 353, 532 P.2d 1081 (Kan. 1975)). In *Shapiro*, the Kansas Supreme Court rejected the argument that sovereign immunity barred payment of interest on a claim for benefits made by an employee's widow. *Shapiro*, 532 P.2d at 1085. *Shapiro* looked to the statutes creating KPERS as a body corporate with the power to sue and be sued, and held that if a government enters into business ordinarily reserved to the field of private enterprise, it should be held to the same responsibilities and liabilities. *Id.* at 1083-84. A member of KPERS or his beneficiary

should be provided the same protection and the same redress as if the breach of contract had been committed by a private insurance company. *Id.* at 1084-85. While the issue in *Shapiro* involved a claim for benefits only, *Midland*'s explanation of the holding in *Shapiro* demonstrates the broad scope of the ruling. These clear holdings compel rejection of KPERS's argument.[10] Indeed, the Kansas legislature in enacting section 60-522, Kan. Stat. Ann. § 60-522 (1994), which we discussed at length in *KPERS III*, has acknowledged that statutes of limitation run as to claims asserted by KPERS.

KPERS has made extended arguments that its operations are governmental functions as opposed to proprietary. The Kansas Supreme Court has made clear that an activity is a proprietary function if it is commercial in character, usually carried on by private parties, or conducted for profit. *See Carroll v. Kittle*, 457 P.2d 21, 28 (Kan. 1969); *State ex rel. Schneider v. McAfee*, 578 P.2d 281, 283 (Kan. Ct. App. 1978). KPERS's actions arising from its investment activities meet this description fully, and do not differ from the suit for contractual benefits involved in *Shapiro*.

Similarly, KPERS argues that the investments are governmental because the profits reduce the burden on Kansas taxpayers to fund KPERS, the funds were invested to stimulate the Kansas economy, and Kansas statutes require the funds to be invested. Insofar as these arguments are not answered by those cases we have cited above, the Kansas Supreme Court's decisions in *Wendler v. City of Great Bend*, 316 P.2d 265, 269, 274 (Kan. 1957), and *Grover v. City of Manhattan*, 424 P.2d 256, 259 (Kan. 1967), compel rejection of KPERS's arguments.[11] This analysis also forecloses KPERS's

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[10] KPERS argues that the Missouri common law doctrine of *nullum tempus occurr it regi* bars all statutes from running against a claim by the state. The Kansas Supreme Court has held in *State Highway Commission v. Steele*, 528 P.2d 1242, 1243-44 (Kan. 1974), that enactment of section 60-521, Kan. Stat. Ann. § 60-521 (1994), abolishes this doctrine where public bodies are operating in a proprietary capacity. Further, the doctrine has been applied by most states only to actions brought by a state in its own courts. *See, e.g., Pennhurst State Sch. v. Estate of Goodhartz*, 200 A.2d 112, 116 (N.J. 1964).

[11] KPERS argues that we should certify to the Kansas Supreme Court several issues presented in its appeal, including the issue of governmental immunity. In

argument that its claims against Peat Marwick arise out of governmental functions.

B.

KPERS argues that its claims are not subject to a statute of limitation because they are actions to recover from a former officer or employee for his breach of duty. *See* Kan. Stat. Ann. § 60-521 (1994). KPERS did not raise this argument in the district court. KPERS contends that this failure is excused because it raised this argument in the state trial court before this case was removed to the district court.

We have often stated that we will not consider arguments that were not presented first to the district court. *See Roth v. G.D. Searle & Co.*, 27 F.3d 1303, 1307 (8th Cir. 1994). If KPERS intended to rely on its breach-of-duty argument, it should have presented that argument to the district court in opposition to the defendants' motions for summary judgment. We refuse to consider KPERS's breach-of-duty argument.

C.

KPERS also argues that the state trial court held that KPERS's claims were not subject to a statute of limitation because the defendants participated in a former officer's breach of duty and that the district court could not ignore the state court's holding. Again, KPERS did not present this argument to the district court, and we reject KPERS's attempt to raise this argument for the first time before this court. *See id.*

KPERS III we decided that the Missouri borrowing statute required the application of the Kansas two- and three-year statutes of limitation. 61 F.3d at 615. KPERS's petitions for rehearing en banc and for certiorari were denied. Our ruling in *KPERS III* is the law of the case, and we reject the suggestion that these issues be certified to another tribunal.

II.

KPERS argues that the district court erred in its conclusion that KPERS had sufficient knowledge to start the statute of limitation running on its claims before December 23, 1988.

KPERS argues that the facts do not show it had knowledge by December 1986 that Home Savings was no longer seeking to acquire the St. Louis savings and loan that Koger advised it about in his June 6, 1986 letter to Russell proffering the opportunity to invest $50 million in Home Savings. First, KPERS contends that the statements the district court cited were only statements that Home Savings would *probably* not buy the St. Louis savings and loan, and that statements of probability are not enough to start the statute of limitation running. (KPERS does not deny that it had knowledge of the statements that the acquisition was unlikely). To the contrary, Kansas law does not require that the plaintiff have ironclad actual knowledge about his injury, but rather that he have such notice as would permit him to discover the injury with the use of due diligence. "'Reasonably ascertainable' does not mean 'actual knowledge.'" *Davidson v. Denning*, 914 P.2d 936, 948 (Kan. 1996). *Accord Miller v. Foulston, Siefkin, Powers & Eberhardt*, 790 P.2d 404, 417 (Kan. 1990); *Brueck v. Krings*, 638 P.2d 904, 908 (Kan. 1982); *Kelley v. Barnett*, 932 P.2d 471, 476-77 (Kan. Ct. App. 1997). The public statements that the St. Louis acquisition was unlikely were enough to put KPERS on notice that its money might not be used to buy the St. Louis thrift.

KPERS contends that there is an issue of fact about whether it learned before 1990 that the St. Louis acquisition did not go through. KPERS points to a memo from outside counsel in Reimer & Koger's files asking: "Was it ever explained to KPERS that [Home Savings] did not buy a big St. Louis association?" Next to this question is the handwritten response, "No." Even if we took this memo as evidence that Reimer & Koger did not tell KPERS the St. Louis deal did not happen, there is still no question but that KPERS was on inquiry notice from other sources cited by the district court, including the November 13, 1986 article in the *Kansas City Star* which stated that Home Savings had "pretty much dropped" the St. Louis deal from consideration. *See Brueck*, 638 P.2d at 908 (fact of injury reasonably ascertainable from press reports); *see also Davidson*, 914 P.2d at 947

(plaintiff charged with knowledge of coroner's report). The fact that KPERS enjoyed a fiduciary relation with Reimer & Koger does not relieve KPERS of the obligation to exercise due diligence. *See Miller*, 790 P.2d at 417.

KPERS contends that the district court erred in imputing to KPERS Reimer & Koger's knowledge of the abandonment of the St. Louis deal. It is not necessary for us to decide whether Reimer & Koger could benefit from the imputation of its knowledge to KPERS. *Cf. Wietharn v. Safeway Stores, Inc.*, 820 P.2d 719, 722-23 (Kan. Ct. App. 1991). The district court only mentioned imputing Reimer & Koger's knowledge to KPERS as an alternative ground, there being other evidence, both press reports and statements that were actually communicated to KPERS, that established notice independently. Order of June 3, 1996, slip op. at 48. For instance, KPERS's executive secretary received a copy of an internal Reimer & Koger memorandum from October 1986 saying the St. Louis deal was "probably dead." Moreover, after Home Savings had failed in its bid for the St. Louis thrift, Reimer & Koger issued letters of intent to KPERS stating that the money would be used by Home Savings for "general corporate purposes." But most telling, the *Kansas City Star* article of November 13, 1986 highlighted the discrepancy between the original plan to use the $50 million to buy a St. Louis thrift and the current situation in which the St. Louis deal had likely been abandoned and the parties had not announced specific plans for what to do with the money. Thus, there is no need to impute Reimer & Koger's knowledge to KPERS to conclude that the limitations periods necessarily expired before KPERS filed its claims.

KPERS also argues that even knowledge that Home Savings did not buy the St. Louis savings and loan would not have started the statute running, since this would not have shown wrongdoing by Home Savings. This argument is difficult to reconcile with KPERS's complaint, since KPERS pleaded as one instance of fraud that the Home Savings defendants represented they would use the $50 million to acquire the St. Louis savings and loan, whereas the defendants knew when they received the money that they would not so use it. If KPERS now contends that the untruth it alleged is "no wrongdoing," we can only conclude that KPERS has abandoned this theory of fraud, making any discussion of the statutes of limitation moot. This argument certainly does not lead to reversal of the district court's

entry of summary judgment.

KPERS also argues that the district court relied on knowledge imputed from Reimer & Koger to conclude that KPERS knew of Home Savings's involvement in risky lending for the benefit of its affiliate banks and its violation of the standby purchasers agreement and other banking regulations. Again, any such imputation was superfluous, there being sufficient proof that knowledge of these facts was public information well within the relevant period.[12]

The existence of regulatory problems and unusual credit risk was made explicit and public by the *Kansas City Business Journal* article of September 12, 1988, which reported severe criticisms of Home Savings by federal savings and loan regulators. The article stated:

> [A] letter sent 11 weeks ago to Home Savings by federal savings and loan regulators told the thrift to sever its relationships with other Morgan-group banks because they violated savings and loan regulations and contravened an agreement Morgan and Dreiseszun entered into when they acquired [Home Savings] in 1985. . . . The letter, which was sent by the Federal Home Loan Bank of Des Moines, Iowa, on June 20, also criticized loan underwriting procedures at the thrift, expressed concern about its low level of capital under generally accepted accounting principles (GAAP) and strongly recommended that it employ a compliance officer.

Such public knowledge is sufficient under Kansas law to put KPERS on notice that it had been injured. *See Brueck*, 638 P.2d at 908. If the two-year tort statute began to run when this article was published on September 12, 1988,[13] it expired before June 5, 1991, when KPERS

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[12] KPERS also states that the district court relied on Koger's testimony about conversations with KPERS's executive secretary that the executive secretary denied. The "denial" KPERS cites is simply: "I have no recollection of being informed that [Home Savings] was in violation of contract or federal regulations concerning affiliated transactions, and I have no reason to believe I ever received such information." But since other, undisputed evidence exists which is sufficient to support the summary judgment, we need not decide if the secretary's lack of recollection would be sufficient to create a material issue of fact as to whether the conversations Koger testified about took place.

[13] The district court pointed to many other instances of notice before the

sued the Reimer & Koger defendants. The three-year statute applicable to the securities fraud claims against the Home Savings defendants would then have expired before December 23, 1991, when KPERS sued those defendants.

As for the alleged failure to reveal Russell's relationship with Home Savings, KPERS contends that the statute did not begin to run when it discovered the facts that Russell had been a Home Savings director and that he had obtained a $40 million loan from a Morgan bank shortly after the KPERS investment in Home Savings. KPERS says that it exercised due diligence after learning of these facts, since the Kansas Attorney General Robert Stephan investigated the issue and concluded that Russell had not transgressed Kansas ethics laws. Therefore, KPERS says, under *Dearborn Animal Clinic, P.A. v. Wilson*, 806 P.2d 997, 1006 (Kan. 1991), and *Gilger v. Lee Construction, Inc.*, 820 P.2d 390 (Kan. 1991), its injury was not "reasonably ascertainable" until a 1991 Kansas legislative investigation indicated that the loans to Russell were not arms' length transactions, but were made after Russell's previous loans were in trouble.

In *Dearborn Animal Clinic* and *Gilger*, the plaintiffs relied on representations by the defendant or by third parties that put them off the trail of the alleged tort. *Dearborn Animal Clinic* was a malpractice action against a lawyer who was asked to draft a contract to sell stock, but instead drafted an option contract that did not obligate the buyer to purchase the stock. When the buyer refused to go through with the sale, the sellers retained a new lawyer, who filed suit to enforce the agreement on the theory that it required the purchaser to buy the stock. 806 P.2d at 1006. The Kansas Supreme Court stated that the statute did not begin to run when the purchaser refused to go through with the sale, since the sellers were entitled to rely on the expertise of their new lawyer, who was still attempting to enforce their original understanding of the agreement. However, the record made clear that by the time the sellers answered interrogatories in their case against the buyer, they knew their contract did not actually require the purchaser to buy their stock. *Id.*

Kansas City Business Journal article. Because the article is sufficient to establish notice, we have no need to discuss the other evidence.

at 1007. At that time, the statute began to run. *Id.* In *Gilger*, the plaintiffs were poisoned by carbon monoxide from an improperly vented furnace. One of the plaintiffs consulted doctors who misdiagnosed her problems. *Gilger v. Lee Constr., Inc.*, 14 Kan. App. 2d 679, 798 P.2d 495, 497 (Kan. Ct. App. 1990). She also contacted two of the defendants, who told her the furnace was working properly. 820 P.2d at 393. Finally, the plaintiffs sought another opinion and were informed that their furnace was improperly vented. 798 P.2d at 502. The Kansas Court of Appeals held that there was a question of fact as to whether the statute began to run before the plaintiffs received the opinion that the furnace was improperly vented. The Kansas Supreme Court affirmed in relevant part. 820 P.2d at 400-01.

In contrast to *Dearborn* and *Gilger*, the plaintiff in this case claims that it was entitled to rely on its own investigation that failed to uncover facts that were actually public knowledge. Throughout this litigation, KPERS has stressed its identity with the state of Kansas. KPERS claims it relied on the report of the Attorney General of Kansas, who is not a defendant or a third party, but who acts for the state of Kansas. The Kansas Attorney General did not discuss Russell's loans in his report. KPERS does not dispute the fact that the existence of those loans was laid bare for the readership of the *Kansas City Star*. In fact, the *Star* article quotes the Attorney General as saying he would undertake an investigation as a result of the *Star* story. The Attorney General's report concluded that Russell's former position as Home Savings director did not violate existing Kansas statutes, and that the existing laws were sufficient to address the "most egregious" conflicts. The Attorney General stressed the importance of having "successful businessmen" on the KPERS board and concluded that some "borderline" situations might be an inevitable concomitant of having such board members. Whatever the reason for the Attorney General's failure to discuss the loans, a plaintiff's choice not to follow up on information in his possession cannot benefit the plaintiff and disadvantage the defendants. *Gilger* and *Dearborn* require a plaintiff to exercise due diligence. KPERS cannot use the Kansas Attorney General's report to toll the statute against the defendants.

KPERS also argues that the district court erred in saying that the statute of limitation began to run before December 1 and December

8, 1987, when the $15 million and $35 million components of the $50 million investment finally closed. The district court held that the statute began to run in December 1986, *see, e.g.*, Order of June 3, 1996, slip op. at 51; whereas, the $50 million was actually invested and reinvested several times, with the last issues of subordinated debentures occurring on December 1 and 7, 1987. However, the fact that KPERS may have chosen to reinvest the money after becoming aware of the facts it says were initially hidden from it does not change the result here. If KPERS contends that it invested its money after it knew or should have known of the relevant facts, then it concedes away the reliance element of its fraud claims. This argument may moot the statute of limitation question, but it does not affect the propriety of the district court's grant of summary judgment against KPERS. In any case, even if the statute began to run on the date of the last investment, December 7, 1987, the relevant two- and three-year periods still expired before KPERS filed suit. Therefore, this argument does not help KPERS.

KPERS argues that the Reimer & Koger defendants' breaches of duty continued into 1990, when Reimer & Koger allegedly concealed facts about Home Savings's financial condition in order to induce KPERS to trade its subordinated debentures for preferred stock. If this argument is meant to establish a tort based on KPERS's conversion from debt to equity, KPERS has made concessions fatal to its claim. The district court recited: "KPERS agrees that its 'ultimate recovery following the OTS takeover was in no way different due to the conversion from debt to equity which occurred in March of 1990.'" Order of June 3, 1996, slip op. at 36.

KPERS contends that the district court improperly constricted KPERS's claims against the Peat Marwick defendants to: failing to tell KPERS its Home Savings investment was impaired; and failing to tell it to establish an investment allowance account. KPERS says that this ignores its allegations that Peat Marwick was the auditor for Home Savings. KPERS alleges Peat Marwick did not reveal a conflict of interest so profound that it should have disqualified Peat Marwick from auditing Home Savings, because, among other things, the managing partner of Peat Marwick's local office was deeply indebted to Home Savings and other Morgan banks and was in financial distress. These allegations do not constitute a separate cause of action, but are only an elaboration on the basic contention that

Peat Marwick failed to alert KPERS to its losses on the Home Savings investment, which kept KPERS from discovering the other defendants' breaches of duty and from acting to stop its losses. The district court held that KPERS was put on notice that the 1987 and 1988 financials did not reflect the true value of the direct placement investments and that this notice occurred at least by the date of the successor auditor's report (September 30, 1989) showing as much as $75 million in impaired investments. Order of July 25, 1996, slip op. at 22. Pointing to additional facts KPERS claims it did not know cannot relieve KPERS of the consequences of what it clearly did know. KPERS contends that the successor auditor's finding that the direct placement investments were impaired did not include a specific finding that the Home Savings investment was impaired. Again, Kansas law does not require that the plaintiff have particularized knowledge of the facts of the negligence, but rather that the plaintiff respond to such notice as would cause a reasonably diligent person to investigate. *See Kelley v. Barnett*, 932 P.2d at 477. After learning there was a problem with the valuation of its direct placement investments, KPERS was not entitled to sit idly by waiting for Peat Marwick to cite chapter and verse.

III.

KPERS also argues that the district court erred in denying it permission to amend its Sixth Amended Complaint to state a claim against the Peat Marwick defendants for breach of contract. The district court set February 1, 1995, as a deadline to amend pleadings, and KPERS filed this motion on November 15, 1995. Denying an eleventh-hour request to amend a Sixth Amended Complaint after the deadline for such amendments has passed is a decision well within the district court's discretion. *See Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 224 (8th Cir. 1994). We will not reverse on this ground. In any event, KPERS's argument that its claims against Reimer & Koger and Peat Marwick could sound in contract is contrary to Kansas law, since KPERS does not allege breach of a contract to achieve a specific result. *See KPERS v. Reimer & Koger Assocs.*, 1997 WL 186988, at *3 (Kan. 1997); *Hunt v. KMG Main Hurdman*, 839 P.2d 45, 48 (Kan. Ct. App. 1992).

IV.

To preserve its position for further proceedings, KPERS renews its argument that we erred in affirming the injunction in *KPERS IV*, 77 F.3d at 1065. KPERS acknowledges that the *KPERS IV* decision is law of the case; therefore, we need not discuss this argument.

We affirm the orders of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Nos. 96-3262 / 3317 / 3680WMKC

Kansas Public Employees Retirement System,
Appellant,

v.

Blackwell, Sanders, Matheny, Weary & Lombardi, L.C., et al.,
Appellees.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 12, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

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August 28, 1997

By Overnight Mail

Honorable Michael E. Gans
Clerk of the Court
United States Court of Appeals
for the Eighth Circuit
511 United States Courthouse
1114 Market Street
St. Louis, MO 63101

RE: Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc., et al., No. 96-3680 (Consolidated with Nos. 96-3317 and 96-3262) (**Before McMillian, John R. Gibson, and Bowman, Circuit Judges**)

Dear Mr. Gans:

Currently pending before this Court is KPERS' Second Petition for Rehearing and Suggestion for Rehearing *En Banc*, filed July 17, 1997. The filing of this petition does not toll the deadline for KPERS to seek certiorari from this Court's decision within 90 days of when it became final with the denial of the first rehearing petition, on June 12, 1997 — that is, *by September 10, 1997*. We wish to alert the Court that, unless we learn by September 10 that this Court has taken action which has the effect of suspending the time limit for seeking certiorari, KPERS will file its petition for certiorari requesting the

Supreme Court to grant review and mandate entry of the requested relief. We respectfully request that this letter be circulated to the members of the panel, and we have enclosed sufficient copies for that purpose.

Respectfully submitted,

/s/ Kenneth Philip Ross
One of the attorneys for KPERS

cc: All Counsel of Record

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	)	
v.	)	
REIMER & KOGER ASSOCIATES, INC., *et al.*, *Defendants.*	)	
	)	No. 92-0922
FRANK MORGAN, et al., *Defendants and Third-Party Plaintiffs,*	)	CV-W-9
v.	)	
RESOLUTION TRUST CORPORATION, *Third-Party Defendant.*	)	Filed June 3, 1996
KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	)	No. 95-0819
v.	)	CV -W-9
BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C., et al., *Defendants and Third-Party Plaintiffs,*	)	
v.	)	
RESOLUTION TRUST CORPORATION, *Third Party Defendant.*	)	

ORDER GRANTING THE HSA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; GRANTING REIMER & KOGER'S MOTION FOR SUMMARY JUDGMENT; GRANTING KEN KOGER'S MOTION FOR SUMMARY JUDGMENT; GRANTING RON REIMER'S MOTION FOR SUMMARY JUDGMENT; GRANTING BRENT MESSICK AND ROBERT CREW'S MOTION FOR SUMMARY JUDGMENT; GRANTING CLIFFORD SHINSKI'S MOTION FOR SUMMARY JUDGMENT; GRANTING SHOOK, HARDY & BACON'S MOTION FOR SUMMARY JUDGMENT; GRANTING FRANK SEBREE'S MOTION FOR SUMMARY JUDGMENT; DENYING KPERS' REQUEST TO STAY CONSIDERATION OF BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI'S MOTION FOR SUMMARY JUDGMENT; AND GRANTING BLACKWELL SANDERS MATHENY, WEARY & LOMBARDI'S MOTION FOR SUMMARY JUDGMENT

On June 5, 1991, the Kansas Public Employees Retirement System (KPERS) brought this suit this suit in Kansas state court against Reimer & Koger Associates, Inc. (Reimer & Koger), Ron Reimer, Ken Koger, Robert Crew, Brent Messick, and Clifford Shinski for claims arising out KPERS' investments in Home Savings Association of Kansas City, F.A. (Home Savings). For purposes of this motion, Reimer & Koger, Koger, Crew, Messick and Shinski will be referred to as the Reimer & Koger defendants. In the same suit, KPERS also asserts a breach of trust claim against Michael Russell, the former Chairman of KPERS' Board of Trustees.

KPERS asserts claims against the Reimer & Koger defendants for gross and wanton negligence, breach of fiduciary duty, and participation in Russell's breach of rust. KPERS also claims that Reimer & Koger breached its contract with KPERS. In addition, KPERS asserts a civil conspiracy claim against individual defendant Ken Koger.

On December 23, 1991, KPERS amended its Complaint and asserted claims against Frank Morgan, Sherman Dreiseszun, Leland Gerhart, I.I. Ozar, Raymond Gifford, Ralph E. Kiene, Randall M. Nay, Tony Salazar, and Phillip Pistilli, (the HSA defendants), and Frank Sebree. KPERS asserts four claims against the HSA defendants and Frank Sebree: fraudulent misrepresentation, statutory securities fraud, participation in Reimer & Koger's breach of duty, and participation in Russell's breach of trust. KPERS asserts a civil conspiracy claim against individual defendants Frank Morgan, Sherman Dreiseszun, I.I.

Ozar and Frank Sebree.

The HSA defendants filed third-party claims against the Resolution Trust Corporation (RTC).

On October 13, 1992, pursuant to 12 U.S.C. § 1441a(1) of the Federal Institution Reform and Recovery Act (FIRREA), the RTC removed the case to this court, case No. 92-0922.

On June 30, 1994, the pending third-party claims against the RTC were dismissed.

On October 14, 1994, the law firm of Shook, Hardy & Bacon (Shook Hardy) filed a Motion to Intervene as a party defendant in case No. 92-0922.

On October 19, 1994, the law firm of Blackwell, Sanders, Matheny, Weary & Lombardi (Blackwell Sanders) filed a Motion to Intervene as a party defendant in case No. 92-0922.

After I recused from considering the Motions to Intervene, United States District Judge Dean Whipple granted Shook hardy's Motion to Intervene and denied Blackwell Sanders' Motion to Intervene and denied Blackwell Sanders' Motion to Intervene on December 29, 1994. The Eighth Circuit Court of Appeals reversed Judge Whipple's decision denying Blackwell Sanders' Motion to Intervene. *KPERS v. Reimer & Koger,* 16 F.3d 1305, 1308 (8th Cir. 1995).

On January 10, 1995, KPERS brought suit against Blackwell Sanders in Kansas district court. KPERS asserts the following claims against Blackwell Sanders: professional negligence, breach of fiduciary duty, participation in Reimer & Koger's breach of fiduciary duty, and participation in Russell's breach of fiduciary duty.

On February 1, 1995, KPERS filed a Sixth Amended Complaint in Case No. 92-0922 in which it asserts, in addition to the original claims, claims against Shook hardy for negligent misrepresentation, breach of fiduciary duty, participation in Michael Russell's breach of trust, and participation in Reimer & Koger's breach of fiduciary duty.

On September 11, 1995, Blackwell Sanders filed a Third-Party Petition against the RTC in the Kansas court.

On September 12, 1995, the RTC removed the Kansas case filed by KPERS against Blackwell Sanders to this court pursuant to FIRREA, 12 U.S.C. § 1441a(1). The removed case, 95-0819-CV-W-9, is now pending before this court.

All defendants in case No. 92-0922, except for Michael Russell, move for summary judgment against KPERS asserting that on the

undisputed facts of this case, KPERS' causes of actions are barred by the applicable statute of limitations. Defendant Blackwell Sanders also moves for summary judgment in Case No. 95-0819 asserting that on the undisputed facts of that case, KPERS' claims are barred by the applicable statute of limitations.

After the defendants moved for summary judgment, KPERS entered into a settlement agreement with HSA defendants Leland Gerhart, Randall M. Nay, Raymond Gifford, Phillip Pistilli, Tony Salazar, and the Estate of Ralph Kiene. On February 20, 1996, I issued an order dismissing those defendants from Case No. 92-0922. Therefore, the remaining HSA defendants are Frank Morgan, Sherman Dreiseszun, and I.I. Ozar.

A hearing was held on February 21 through February 23, 1996, were the parties presented oral argument on defendants' Motions for Summary Judgment on the statute of limitations issue.

I.
STANDARD FOR MOTION FOR SUMMARY JUDGMENT

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Inland Oil and Transport Co. v. United States,* 600 F.2d 725, 727-28 (8th Cir.), *cert. denied*, 444 U.S. 991 (1979).

If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *Roberts v. Browning,* 610 F.2d 528, 531 (8th Cir. 1979); *United States v. Porter*, 581 F.2d 698, 703 (8th Cir. 1978). The summary judgment procedures is not a "disfavored procedural shortcut." Rather, it is "an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327

91986); *see also, City of Mt. Pleasant v. Associated Electric Cooperative, Inc.*, 838 F.2d 268, 273 (8th Cir. 1988). Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex,* 477 U.S. at 324.

The moving party bears the initial burden of demonstrating by reference to portions of pleadings, dispositions, answers to interrogatories and admissions on file, together with affidavits, if any, the absence of genuine issues of material fact. However, the moving party is not required to supports its motion with affidavits ro other similar materials negating the opponent's claim. *Id.* (emphasis added).

The moving party is then required to go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* A party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in his pleadings to get to a jury without any significant probative evidence tending to support the complaint. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986).

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The evidence favoring the nonmoving party must be more than "merely colorable." *Id.* at 2511. When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio,* 106 S. Ct. 1348, 1356 (1986) (footnote omitted).

The inquiry to be made mirrors the standard for a directed verdict: whether the evidence presented by the party with the onus of proof is sufficient that a jury could properly proceed to return a verdict for that party. *Anderson v. Liberty Lobby,* 106 S. Ct. at 2511. Essentially, the question in ruling on a motion for summary judgment and on a motion for directed verdict is whether the evidence represents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 2512.

II.
UNDISPUTED FACTS

Based on the parties' pleadings, affidavits, deposition testimony, and admissions on file, the following facts are undisputed.

A. Facts Relevant to All Claims

Plaintiff KPERS is an agency and instrumentality of the State of Kansas. It is vested with the power and authority to create a statewide retirement system. KPERS administer a pension fund for over 162,000 Kansas employees through the State Treasurer's office.

KPERS' Board of Trustees (Board) is the managing body of the statewide retirement system. The Board is comprised of seven members who serve four year terms. Each trustee is appointed by the Governor of Kansas and confirmed by the Kansas Senate.

On August 3, 1983, Governor John Carlin appointed Michael Russell to KPERS' Board. Russell was elected Chairman of the Board in August 1985 and retained that position until he resigned in August 1987. Russell was a Kansas City real estate investor and entrepreneur who owned a substantial interest in American City Business Journals and was a principal in the Russell/Worley Group, an investment firm. Russell depo. at 12-13.

Larry Jones served as Chairman of the KPERS' Board from August 1987 through December 1987. Thomas Hamill served as Chairman of KPERS' Board from December 1987 to April 1991. Hamill depo. at 16-17.

Pursuant to K.S.A. § 74-4908(1), the Board appoints an executive secretary to be "the managing officer of the system." Marshall Crowther served as executive secretary from June 1981 to August 9, 1991.

Crowther regularly attended KPERS' board meetings and recorded the minutes of those meetings. Before KPERS' Board meetings, Crowther prepared packets containing written reports from investment advisers scheduled to appear before the Board. Crowther depo. at 230. Crowther was also KPERS' contact person with its outside investment counselor and investment advisers.

Pursuant to K.S.A. § 74-4921(1), the KPERS' Board engaged the firm of Callan Associates, Inc. (Callan) to serve as its investment counselor. Callan is a nationally known investment consulting firm

that primarily provides advice and investment performance measurement services to institutional investors such as pension funds. Callan was retained by KPERS from the mid-1970's to 1991.

Ronald Peyton, Callan's president, regularly attended KPERS' Board meetings and advised the Board about KPERS' investments and the performance of KPERS' investment advisers. Mont Draper depo. At 228-229; Crowther depo. at 88. In addition, Callan reviewed the investment status reports that the investment advisers submitted to KPERS and reported to the Board any problems or issues found in the investment advisers' reports.

KPERS' Board also hired Callan to assist the Board in performing the annual examination of KPERS' investment program required by K.S.A. § 74-4921(10). Section 74-4921(10) provides that the examination "shall include an evaluation of current investments policies and practices and of specific investments of the fund in relation to the [investment] objective." Callan also submitted quarterly performance measurement reports to the Board. Peyton depo. At 32.

The KPERS' Board delegated the authority and responsibility for making individual investment decision to its outside investment advisers. See K.S.A. § 74-4921(7). On May 22, 1973, KPERS hired Reimer & Koger, a Kansas-based investment management firm, to serve as one of its investment advisers. Through February 15, 1985, Reimer & Koger managed two portfolios, the Kansas Equity Fund and the Kansas Debt Fund, for KPERS. From 1985 through 1991, Reimer & Koger was KPERS' investment adviser for the Kansas Investment Fund.

Defendants Ron Reimer and Ken Koger were principals of Reimer & Koger at all times relevant to this lawsuit.

Defendant Clifford Shinski was an employee of Reimer & Koger, where he was primarily responsible for the operational systems, including all computer-generated reports. On march 30, 1989, Shinski left Reimer & Koger.

Roger Crew was employed by Reimer & Koger from October 1986 through early 1991. Crew was hired by Reimer & Koger to monitor companies in which KPERS invested KIF funds.

Brent Messick was employed by Reimer & Koger from July 1, 1986, until June 1991. Messick was hired by Reimer & Koger to monitor companies in which KPERS invested KIF funds. Messick

depo. At 11-12.

In 1983, Kansas Governor John Carlin began to promote the use of KPERS' funds to jump-start the sagging Kansas economy by providing capital to Kansas-based companies. In response, KPERS' Board began considering using a portion of KPERS' funds for direct placement investments, which are investments that are negotiated and purchased directly from a company rather than through a public market.

On April 12, 1983, Home Savings loaned $13.57 million to the Russell/Worley Group, headed by Russell and his business partner William Worley.

On September 1, 1983, Home Savings loaned $7.45 million to the Russell/Worley Group.

By 1984, Home Savings Association of Kansas City (Home Savings) was a troubled Missouri savings and loan owned by its depositors. On February 27, 1984, Frank Morgan, a Kansas City real estate investor, and Randall Nay, on behalf of Home Savings, signed a letter of intent setting forth an agreement between Morgan and Home Savings in which Morgan agreed to purchase part of Home Savings at the same time that Home Savings was transformed into a federally chartered savings and loan. Plaintiff's Ex. 472.

On February 29, 1984, Home Savings sought approval from the Federal Home Loan Bank Board (FHLBB) for Home Savings to undergo a "modified conversion" that would convert home Savings into a federally chartered savings and loan. Home Savings qualified for the "modified conversion" because it was a "troubled institution" as defined in federal regulations. Gerhart depo. At 73-74. The request named Morgan and Sherman Dreiseszun, Morgan's uncle and business partner, as "Standby Purchasers." As Standby Purchasers, Morgan and Dreiseszun agreed to acquire any shares of stock in the new association that existing association members did not purchase. Plaintiff's Ex. 71.

On February 15, 1985, the Board voted to combine two KPERS' funds, the Kansas Equity Fund and the Kansas Debt Fund, into a new fund designated as the Kansas Investment Fund (KIF). The KIF fund was a portfolio within the general KPERS fund that was designated for direct placement investments in Kansas-based companies or companies that directly impacted the Kansas economy.

In March 1985, the KPERS Board reviewed and adopted

Investment Policy Guidelines for KIF. Addendum A to the Investment Policy Guidelines stated:

> It is recognized that the investments in companies that have an effect upon the Kansas economy may experience somewhat higher ranges of volatility than is associated with other investments of the fund. Nevertheless, it is the intention of the board that these funds be invested with prudence and good judgment in the securities of companies that have an effect upon the economy of Kansas.

On June 11, 1985, the FHLBB approved Morgan and Dreiseszun's purchase of Home Savings subject to certain conditions. For example, the FHLBB required Morgan and Dreiseszun to enter into a standby Purchasers Agreement that required the Standby Purchasers to refrain from intermingling business transactions between Home Savings and affiliated banks owned by Morgan, Dreiseszun and their families. Morgan, Dreiseszun, and their families owned or had an interest in Merchants Bank, Mission Bank, Security Bank, International Bank, and Metro North State Bank (Metro North).

In August 1985 Home Savings stock was offered for sale in connection with the "modified conversion." The 1985 Subscription Offering Circular (Offering Circular), issued in connection with the offer and sale of Home Savings stock, disclosed the Standby Purchaser's Agreement and its provisions. Shook Hardy Ex. (Hereafter SHB ex. ___) 7 at 50. The Offering Circular also stated that Home Savings planned to reduce its emphasis on residential lending and focus on commercial real estate loans, construction loans, and one-to-four family residence loans. SHB ex. 7 at 2. Koger read the 1985 Subscription Offering Circular before KPERS' initial investment in Home Savings. Koger depo. At 332.

On September 9, 1985, Home Savings engaged its regulatory counsel, Elias, Matz, Tiernan &Herrick (Elias Matz) of Washington, D.C. to issue an opinion regarding which banks were affiliates of Home Savings for purposes of the Standby Purchasers Agreement. Elias Matz opined that the following Morgan and Dreiseszun family holdings in various financial institutions were not affiliates under the Standby Purchasers Agreement: Metro North, Valley View State Bank, and Industrial State Bank. The law firm opined that Merchants Bank, Security National Bank, and Mission Bank were affiliates.

HSA Ex. 40.

On September 20, 1985, I.I. Ozar advanced $1 million to Home Savings in exchange for "stock relative to the amount of money advanced." Plaintiff's Ex. 431. At all times relevant to this lawsuit, Ozar was Chairman of the Board of Metro North and owned stock in Metro North's parent company. Ozar was also a stockholder and member of the board of directors of Merchants Bank.

On September 23, 1985, Home Savings converted into a federally chartered savings association and stock corporation. Plaintiff's Supplemental Ex. 12. After the "modified conversion" was complete, Morgan and Dreiseszun owned a controlling share of Home Savings' common stock.

From October 9, 1985, to March 14, 1991, Morgan and Dreiseszun were directors and members of the Executive Committee of Home Savings. During that same period, I.I. Ozar served as a director and member of the Executive and Audit Committees of Home Savings. Michael Russell was also elected to the Board of Directors of Home Savings on October 9, 1985.

Defendant Frank Sebree, a Shook Hardy partner, was a director and general counsel of Home Savings at all relevant times until February 8, 1991. Sebree depo. At 10, 31-32.

In November 1985, Leland Gerhart became a Director, president, and Chief Operating Officer of Home Savings. In May 1989, Gerhart became Chief Executive Officer and Chairman of the Board of Home Savings and remained in those pistons until March 15, 1991.

In a letter dated December 19, 1985, Ronald Peyton wrote to Crowther:

> The firm of Reimer and Koger agreed to develop the concept of the KIF and make initial investments in the program under their existing asset management agreement with KPERS. Over the past year Reimer and Koger have made some very appealing, high potential investments for the fund. While these investments are generally higher risk than KPERS' other assets, the average return potential for each is in the range of 19 to 20 percent per annum which is well above market.

HSA Ex. 5.

Peyton stated at his deposition that he warned the Board that

economically targeted investments such as those to be made using KIF funds was not an appropriate investment for KPERS. Peyton depo. at 39, 92.

On December 27, 1985, Reimer & Koger entered into a Special Investment Advisory Services Agreement (the Agreement), which authorized Reimer & Koger to make direct placement investments using KIF funds. Plaintiff's Ex. 250. KPERS' Statement of Investment Policy (the Guidelines) was incorporated into the Agreement. Plaintiff's Ex. 250. The Guidelines require that KPERS' assets be invested using a "prudent man" standard. See Plaintiff's Sixth Amended Complaint (Complaint), Exhibit B at ¶ 1, Statement of Investment Policy dated July 26, 1985. See also K.S.A. § 74-4921(2).

Section 2.01 of the Agreement delegated to Reimer 7 Koger the responsibility of "selecting and making suitable and appropriate Investments on behalf of KPERS . . . in accordance with the Guidelines." Section 2.02 of the Agreement provides that Reimer & Koger was authorized 'to take on behalf of KPERS all actions necessary, helpful or advisable to perform the responsibilities of the Advisor . . . consistent with the Guidelines."

The Guidelines also granted Reimer & Koger the discretion to make direct placement investments, not exceeding $15 million, without Board approval. Complaint, Ex. B at ¶ 10. Reimer & Koger had to obtain a waiver of the Guidelines for investments exceeding $15 million.

Article V of the Agreement provided that "compliance with the investment objective set forth in the Guidelines shall be determined on the basis of reasonable expectations at the time of investment (as opposed to actual future performance), and in no event shall the Adviser be deemed to have made any representation or warranty that any such objective will actually be obtained." Plaintiff's Ex. 250.

On December 21, 1985, Morgan met with Koger to discuss the possibility of KPERS investing in Home Savings. HAS Ex. 14; SHB Ex. 8. Crowther received a copy of the December 21, 1985, memorandum memorializing the meeting. SHB Ex. 8.

On January 3, 1986, the FHLBB issued an examination report entitled "10/28/85 Examination Report" which noted Home Savings' growing emphasis on commercial and commercial real estate lending. Plaintiff's ex. 75 at 560. The "10/29/85 Examination Report" further

stated that "[t]he significant volume of this type of lending has exposed the association to significant credit risk." Plaintiff's Ex. 75 at 553.

On January 6, 1986, in a memo to the "KIF" file which included a carbon copy to Crowther, Koger states that on December 31, 1985, Reimer & Koger issued a commitment letter to Home Savings from the purchase of Homes Savings subordinated debentures. Reimer & Koger Ex. 25. Koger further stated that Russell had told him that he was a director of Home Savings. Koger wrote that something would have to be done about Russell's position as a director of Home Savings if KPERS agreed to invest in Home Savings. Reimer & Koger Ex. 25.

In January 1986, Reimer & Koger retained Blackwell Sanders to handle the legal work on KPERS' $15 million investment in Home Savings. Shook Hardy represented Home Savings in connection with the investment.

On January 16, 1986, Reimer & Koger issued a Letter of Intent on behalf of KDF, a nominee partnership controlled by KPERS, for $15 million in subordinated debentures. Affidavit of Ken Koger at ¶¶ 11, 13.

On January 23, 1986, Merchants Bank loaned $15 million to the Russell/Worley Group. Plaintiff's ex. 440. Russell personally guaranteed the loan. Plaintiff's Ex. 440.

On February 6, 1986, Koger wrote a memo to Crowther that stated that Russell was on the Home Savings Board of Directors. HSA Ex. 27. The memo to Crowther also outlined the due diligence that Koger performed on Home Savings. HSA Ex. 27. Concerning the Home Savings business direction and credit risk, Koger stated:

> They are taking credit risk. The Frank Morgan boosters would suggest they aren't really taking risk all that much. Outsiders would say the portfolio is more risky than one might like to believe.
>
> * * *
>
> Again, they don't have a methodology yet for [e]mperically quantifying the amount of credit risk they are willing to accept.
>
> * * *

> [The bank regulators] reviewed the business plan and noted the plans call for a growth of $1 billion within 24 months and that the focus would be on commercial and real estate lending.
>
> * * *
>
> All in all, I was very pleased and although the rising scheduled items/slow loans is of concerned [sic], it would appear to me it is manageable and it doesn't appear there are any substantial losses lurking in the woods.

HSA Ex. 27.

Koger also stated in the memo that Home Savings needed to comply with federal limits on loans to its subsidiary, Home Service Corporation. HSA Ex. 27 at 2; see also SHB Ex. 30 at 2.

On February 8, 1986, the FHLBB officially accepted the Elias Matz opinion concerning which Morgan/Dreiseszun banks were affiliated with HSA for purposes of the Standby Purchasers Agreement. The FHLBB's position was conditioned on the accuracy of the representations and information contained in the Elias Matz opinion. HSA Ex. 41.

ON February 12, 1986, the Home Savings Board of Directors approved the issuance of the subordinated debentures during a board meeting. HSA Ex. 17. At that meeting, Russell resigned from the Home Savings Board because of his position as Chairman of KPERS' Board. From the minutes, it is not clear whether Russell resigned before, after or during the discussion of KPERS investments. HSA Ex. 17.

KPERS' Board members understood that direct placement investments, which were not publicly traded would be difficult to value. Draper depo. At 284; Younger depo. At 103-104.

KPERS' Board members also understood that the KIF fund's risk level was higher than that of traditional investments. *See* letter dated March 6, 1986, from Crowther to Koger at Peat Marwick Ex. 16.

On March 28, 1986, Merchants Bank loaned $20 million to the Russell/Worley Group. The proceeds of the loan were used to retire the January 23, 1986 $15 million loan and to supply additional funds to the Russell/Worley Group. Russell personally guaranteed the loan. Plaintiff's Ex. 441.

On March 31, 1986, Home Savings published its Form 10-K which stated that the FHLBB deemed certain loans to Home Savings' subsidiary, Home Service Corporation, to be in violation of bank regulations that restrict the amount of loans that may be made to a single borrower. HSA Ex. 29 at 44.

Home Savings' 1986 Annual Report published in May 1986 disclosed millions of dollars in loan transactions that Home Savings had entered into with affiliated banks. The annual report also disclosed the Standby Purchasers Agreement. HSA Ex. 3; SHB Ex. 9.

In its Annual Reports for 1987, 1988, and 1989, Home Savings disclosed transactions with affiliated banks and the Standby Purchasers Agreement. SHB Ex. 3 at 35, Ex. 43, Ex. 44. Reimer 7 Koger reviewed Home Savings Annual Reports. Reynolds dep. At 146-47.

On May 2, 1986, KPERS first $15 million investment in Home Savings closed when Home Savings issued $15 million in subordinated debentures to KDF. Affidavit of Ken Koger at ¶ 13. Sebree, in his capacity as general counsel and secretary of Home Savings signed an opinion letter for the closing of the investment stating that "[t]o the best of our knowledge and belief, the Association is not in violation of any agreement, instrument statute, rule or governmental regulation applicable to it." Complaint, ¶ 172; Affidavit of Frank P. Sebree at ¶ 3.

At or about this same time, the FHLBB approved the inclusion of the Home Savings-issued subordinated debentures in Home Savings' regulatory capital.

On June 6, 1986, Koger wrote Russell outlining a proposed $50 million additional investment in Home Savings starting that he had an "exceptional investment opportunity" for KPERS. Koger stated that the "financing purpose would be to allow Home [Savings] to acquire a targeted $1 billion St. Louis based savings & loan association." Because of the $50 million size of the investment, Koger stated that he trustees would have to waive the investment limit in Addendum A of the Statement of Investment Policy. Plaintiff's Supplement Appendix Ex. 17 at 117.

By telephone on June 6, 1986, the KPERS' Board was polled concerning a waiver of the $14 million KIF investment limit so that $50 million could be invested in Home Savings. All seven trustees

voted yes. HSA Ex. 45.

On June 11, 1986, Merchants Bank loaned $25 million to the Russell/Worley Group. The proceeds of he loans were used to retire the March 28, 1986, $20 million loan and to apply additional funds to the Russell/Worley Group. Russell personally guaranteed the loan. Plaintiff's Ex. 442.

On approximately June 6, 1986, Home Savings made a bid to acquire a failed St. Louis federal savings and loan from the United States. Plaintiff's Supplemental Ex. 12 at 9. Gerhart stated in his deposition that sometime in the fall of 1986, he realized that it was unlikely that Home Savings would win in the bidding process for the St. Louis savings and loan. Gerhart depo. At 66-67.

In September 1986, Reimer & Koger issued to Home Savings letters of intent for KPERS' $35 and $15 million investments in Home Savings. HSA Exs. 47, 48; SHB Ex. 29. The letters of intent stated that KPERS would purchase two high-yield unsecured subordinated debentures, one in the principal amount of $15 million and one in the principal amount of $35 million, and that the proceeds would be used for "general corporate purposes." HSA Exs. 47, 48; SHB Ex. 29.

On September 19, 1986, Reimer & Koger issued to KPERS a KIF Update report that stated with respect to Home Savings:

> A $50 million investment will be made in Home Savings enabling the S & L to acquire a targeted $1 billion in St. Louis based Savings and Loan association, as a result of Federal Home Loan actions. The positive impact on the Kansas economy is significant.

Also on September 19, 1986, copies of the letters of intent were distributed to Board members during a presentation that Reimer & Koger made to the Board. Plaintiff's Statement of Undisputed Facts ¶ 151; Affidavit of Ken Koger ¶ 20.

On September 30, 1986, because the parties were not prepared to close on the $50 million in subordinated debentures, Home Savings issued two interim promissory notes at the same interest rate as the debentures. The promissory notes were fully secured by commercial mortgages, an the collateral was delivered to KPERS on September 30, 1986.

In October 1986, Home Savings retained Shook Hardy to represent it in connection with KPERS' $50 million investment in Home

Savings.

On October 6, 1986, Robbin Reynolds of Reimer & Koger wrote a memo to "HSA file" in which she stated that she had learned from Leland Gerhart that "the St. Louis S & L situation is probably dead" because Ford Motor Credit has been the highest bidder. HSA Ex. 42 at 6. Koger stated in his affidavit that he sent a copy of the October 6, 1986, memo to Crowther and Russell and that he notified Crowther orally that "Home Savings' acquisition of the St. Louis savings and loan was unlikely." He later advised them it would not occur. Affidavit of Ken Koger at 23.

On October 17, 1986, Reimer & Koger sent to KPERS an update on KIF investments. Under the heading "Home Savings Association of Kansas City," the report stated:

> A $50 million investment has been made in Home Savings enabling the S & L to expand its lending base, loan limits and its operations. This investment strengthens HSA's financial situation and enables the S & L to take advantage of attractive acquisition opportunities as they arise.
>
> Earlier in the year, a $15 million investment was made in the firm as well.

HSA Ex. 44 at 2.

On October 23, 1986, KPERS appointed Koger attorney-in-fact

> to make, execute, indorse, accept, and deliver in its name or in the name of its said attorney (without signature guarantee or other restriction) all checks, notes, drafts, warrants, acknowledgments, agreements and all other instruments in writing, of whatsoever nature in connection with the purchase of securities identified as $50,000,000.00 Home Savings Association, including any and all documents and instruments deemed necessary or appropriate by its attorney-in-fact in this sole discretion.

SHB Ex. 2.

On October 24, 1986, KPERS purchased from Home Savings $50 million in subordinated convertible debentures and the interim promissory notes were canceled. Plaintiff's Ex. 89 at Tab. 92. The

debentures included a mandatory redemption provision that required Home Savings to redeem the debentures if Home Savings' net worth fell below $25 million increased by 8% per year cumulatively for each year beginning March 3, 1988. Reimer & Koger Ex. 41.

Koger testified that the mandatory redemption provision was good for KPERS but that, based on his experience, the FHLBB would not likely approve the subordinated debentures as regulatory capital with the mandatory redemption privilege included. Koger depo. at 425; Reimer & Koger Ex. 41. In fact, the FHLBB refused to agree to approve the subordinated debentures as regulatory capital with the mandatory redemption privilege, and therefore, Reimer & Koger waived the provision on May 21, 1987.

Opinion letters prepared by Sebree on behalf of Home Savings for the closing of the $15 million subordinated debenture and the $35 million subordinated debenture stated that "[t] the best of our knowledge and belief, the Association is not in violation of any term of its Charter, Bylaws, or any agreement, instrument, judgment, decree, order, statute, rule or governmental regulation applicable to it." Plaintiff's Ex. 346 at ¶ 8; Plaintiff's Ex. 454 at ¶ 8.

Sometime after October 24, 1986, the $50 million in subordinated debentures were canceled and additional interim promissory notes were issued by Home Savings.

On October 31, 1986, Metro North loaned $40 million to Russell's American City Business Journals. Plaintiff's Ex. 443. Russell personally guaranteed the loan. Plaintiff's Ex. 443. On that same date, Home Savings signed an agreement with Metro North to participate in the American City Business Journal's $40 million loan to the extent of $7.5 million. Plaintiff's Ex. 443 at 4357.

On November 13, 1986, *The Kansas City Star* published an article stating that Home Savings has "pretty much dropped a St. Louis acquisition from consideration." HSA Ex. 51. Crowther testified that he sent a copy of this article to all the KPERS' trustees. Crowther depo. At 664-665.

Gage & Tucker attorney Tom Higgins stated at his deposition that at least by November 1986, he understood that the purchase of the St. Louis Savings and Loan might not go through. However, he stated that the purchase was not material to KPERS' investment in Home Savings because Home Savings could acquire another Savings & Loan. Higgins depo. At 64-66, 388-391. He further stated that he did

not think there "was any unique property to [the St. Louis] institution that made it especially desirable." Higgins depo. At 65-66.

On November 19, 1986, Home Savings issued to KPERS a $35 million debenture and the interim promissory notes were canceled.

On December 21, 1986, *The Kansas City Star* contained an article questioning whether Russell's role in the KPERS/Home Savings investment created a conflict of interest because of Russell's relationship with Frank Morgan and Russell's loans from Frank Morgan's banks. SHB Ex. 72; HSA Ex. 10. The article suggested a link between KPERS' $50 million investment in Home Savings and the $40 million loan made by Metro North to American City Business Journals. SHB Ex. 72 at 8956. The article also reported the reaction of various KPERS Board members, including Richard Hrdlicka and Mark Youngers, to the allegations. SHB Ex. 72 at 8958.

Crowther stated at his deposition that *The Kansas City Star* reporter had been interviewing people at KPERS for the story and that as a result of *The Kansas City Star* article, he was aware of the allegations made against Russell. Crowther depo. At 355.

In early 1987, the Kansas Attorney General began an investigation into Russell's potential conflict of interest. On March 24, 1987, the Kansas Attorney General issued an opinion stating that Michael Russell has not been involved in a conflict of interest with respect to his board membership in Home Savings and his participation as a trustee in KPERS.

On June 5, 1987, the FHLBB gave Home Savings permission to include $20 million of the $35 million subordinated debenture in Home Savings' regulatory capital.

In August 1987, Russell resigned from the KPERS' Board.

On December 7, 1987, the FHLBB gave Home Savings permission to include the remaining $15 million of the $35 million in Home Savings' regulatory capital.

On December 8, 1987, Home Savings issued to KPERS a $15 million subordinated debenture, and the interim promissory note was canceled.

In its June 1988 Examination Report, the FHLBB stated that Home Savings transactions with Metro North violated the Standby Purchasers Agreement because Ozar and Dreiseszun had a significant ownership in Metro North and were directors at Home Savings. Koger discussed the violations with Gage & Tucker to determine

whether a default had occurred. Reimer & Koger did not declare a default. Ken Koger depo. At 653. Koger stated in his deposition that default was probably not declared because it would have been Reimer & Koger's conclusion that the violation was remedied or that the violation was not a significant one. Koger depo. At 653.

In a June 5, 1988, memo to the "HSA file," Linda Faucett of Reimer & Koger noted that Home Savings incurred a large pretax net loss of $3.77 million before taxes and stated:

> I also question what additional potential losses might be out there. Since the tremendously high increase in the loan loss reserve came at the time of the year-end audit, I wonder if [Peat Marwick] required it to be increased in order to sign-off on the unqualified report . . . If this is the case, what kind of potential write-offs are out there, and is it an indication that the commercial real estate loans could cause the company significant problems?

On July 8,1988, Messick and Reynolds met with Gerhart to discuss Home Savings' compliance with the subordinated debentures covenants. In a memo dated August 4, 1988, to the "Home Savings File," memorializing the meeting, Reynolds stated: "[W]e discussed the loan problems seen in Home Savings' portfolio. Leland stated that management is concerned about the problems they have incurred, but feels that they took the adequate hits to [profit and loss] and have the problems behind them. The major problem account has been the Russell Morley [sic], a $5,000,000 unsecured loan basically for six second mortgages on hotels in the early 1980's." Plaintiff's Ex. 272.

On July 22, 1988, in "A report to Kansas Public Employees Retirement System Board of Trustees," Reimer & Koger stated that Home Savings "has positioned itself for significant growth potential and profitability over the next few years." Plaintiffs. Supplemental Ex. 22 at 29.

In 1988, Home Savings sought to merge with Safety Federal Savings & Loan Association of Kansas City (Safety Federal). Affidavit of Leland Gerhart, ¶ 26, at SHB Ex. 14. In conjunction with the merger, Home Savings issued on August 13, 1988, a Subscription Offering Circular (the 1988 Offering Circular) that referenced the FHLBB's concerns about Home Savings' transactions "with affiliated of the Association." Under the heading "Concerns of the FHLBB of

Des Moines," the following appears:

> Home recently received a letter dated June 20, 1988 from the FHLBB of Des Monies (the "FHLBB Letter") transmitting a recently completed examination report regarding the Association. The FHLBB Letter states that federal regulatory authorities are very concerned about Home's low level of GAAP capital, its high level of commercial real estate lending, recent significant increase in non-performing capital, its high level of commercial real estate lending, recent significant increases in non-performing loans, loan underwriting and monitoring policies and procedures, and transactions with affiliates of the Association.

See SHB Ex. 60.

In a memo dated August 30, 1988, Reynolds wrote to Koger that she obtained information from three dealers in private placements about KPERS' ability to sell the Home Savings subordinated debentures. Plaintiff's Ex. 256 at 25031. She stated that "HSA would be a tough sell given its current financial position." *Id.* Specifically, she stated that David Hancock of Moore-Juran had determined that Home Savings was in a weak financial position with a negative tangible net worth of $10 million and with $100 million in nonaccruing loans. Furthermore, he stated that Home Savings' financial position had deteriorated since KPERS' investment was made and that Home Savings needed to have a positive net worth before KPERS could successfully sell the subordinated debentures. Plaintiff's Ex. 256 at 2774.

Furthermore, Reynolds stated in her memo that Claudia Coleman of Alex Brown & Sons, Inc. said that regulatory violations raise a concern that the FHLBB could take over the institution resulting in the investors losing their investment. Coleman stated that she would assign to Home Savings debentures a "CCC" rating because of the 16% yield, a yield she believed not attractive in the market because of credit concerns about Home Savings. Plaintiff's Ex. 256 at 2775, 2778.

Reynolds stated that Michael Leit of Bear Stearns had determined that he would not be able to sell the bonds at a price that Reimer & Koger would find reasonable. Plaintiff's Ex. 273. Leit compared Home Savings to two other institutions, in a turnaround position,

whose bonds were selling for 50 cents on the dollar. Plaintiffs' Ex. 273. He stated that his conclusions was base don the following: 1) Home Savings had low GAAP net worth with no margin for error; 2) Home Savings portfolio was too heavy in risky commercial real estate loans; 3) Home Savings substandard assets were increasing; 4) Home Savings had 22 loans with affiliated banks totaling $151 million; and 5) Home Savings had made seven loans to associates of two of its major stockholders totaling $17.4 million. Plaintiff's Ex. 273.

On September 12, 1988, the *Kansas City Business Journal* contained an article discussing Home Savings' proposed merger with Safety Federal. The article reported that Home Savings was in violation of bank board regulations and the Standby Purchasers Agreement and that federal regulators had concerns about Home Savings' low level of GAAP capital and significant increases in non-performing loans. Furthermore, the article stated that "[s]ince it was acquired by Morgan and Dreiseszun in 1985, Home Savings has shifted its emphasis from residential loans to commercial real estate lending." SHB Ex. 27.

Koger stated in his deposition that he discussed issues raised in the newspaper article with Crowther. Koger depo. At 476-480.

In a memorandum to "HSA file" dated November 28, 1988, Reimer & Koger associate Linda Faucett analyzed Home Savings' performance for the first and second quarters of 1988. Plaintiff's Ex. 274. Faucett noted that Home Savings had a "considerable amount of [its] portfolio in the commercial real estate area, which entails significant additional risks as compared to residential property lending." She also noted that the FHLBB had notified Home Savings about it concerns with "Home's low level of GAAP capital, its high level of commercial real estate lending, [and] recent significant increases in non-performing loans." Plaintiff's Ex. 274.

On February 24, 1989, in "A report to Kansas Public Employees Retirement System Board of Trustees," Reimer & Koger once again stated that Homes Savings "has positioned itself for significant growth potential and profitability over the next few years." Plaintiff's Supplemental Ex. 23 at 35.

In a March 14, 1989, memo to "HSA file", Linda Faucett memorialized a quarterly compliance meeting with Leland Gerhart. Under the heading "Transactions with Affiliates," Faucett wrote that the FHLBB once again was claiming that Homes Savings violated the

Standby Purchasers Agreement and wanted Home Savings to sign a cease and desist order stating that it would not violate the Standby Purchasers Agreement. HSA Ex. 65 at 3.

In a March 19, 1989, memo to "HSA File," Reynolds noted Home Savings' strategy was to take credit risk. She also noted the increase in Home Saving's commercial loan delinquencies and the potential problem of new regulatory capital requirements. SHB Ex. 53 at 1.

KPERS' trustee Donald Barry testified before the Joint Committee on KPERS Investment Practices that in May 1989, the KPERS trustees were concerned about Home Savings capital investment.

> Q. [Y]ou relied on Callan and Associates to substantiate the validity of the background material that the direct placements manager provided you in their short summary reports.
>
> A. You bet I did . . . . [T]here were questions . . . about junk bonds, and I can recall in May of 19879, you know, I read the Kansas City paper, and I saw the capital structure of Home Savings. This was even before FIRREA, and . . . I asked Callan, and I was told that they were going to restore — Frank Morgan was going to restore the necessary capital. It was 75 or so, you know million or so and I asked during that meeting, you know, I think — I may not be right on this, but it seemed to me that the minimal capital requirements was like three percent per FIRREA, and they were right at Three percent, and Executive Hills and a number of others had not broken yet, but anybody in the real estate business that drove to the Kansas City Airport could look at those see-through buildings and raise a question of, you know, what was coming, so we asked that question.
>
> * * *
>
> Q. This was the Home Savings investment?
>
> A. Yeah. I mean, this wasn't any secret. I mean you know, you guys talked about it in your Senate Bill 615. You didn't want any more junk bond investments, you know. That was part of the testimony before you in the '88 legislative session,

> so we were looking, you know, 'Hey, if this thing is going to go down' — and this was before even FIRREA, is there some way we can, you know, protect it. Those were the kind of questions, you know, that we were asking.

Transcript of Testimony of Barry before the Joint Committee on KPERS Investment Practices on December 11, 1991, at 3345-3346.

On June 2, 1989, Crowther sent to Trustee B.B. Andersen a Reimer & Koger report, dated January 11, 1989, which stated that "HSA credit quality has deteriorated since date of purchase." HSA Ex. 72 at 24681. The report also stated that in September 1988 Home Savings had a tangible negative net worth of $9.2 million and that Home Savings' substandard assets were high relative to the industry. HSA Ex. 72 at 24681.

In a June 8, 1989, memo to Koger concerning "Protection and Alternatives in Relation to Home Savings," Reynolds discussed the ability of Reimer & Koger to declare the Home Savings subordinated debentures in default. She stated that "[w]hile we have relatively strong language as to covenants and default provisions in our agreements, we are strongly limited as to remedies." SHB Ex. 83.

KPERS Trustee B.B. Anderson stated in his deposition that the had concerns that KPERS' direct placement investments did not comply with the prudent man standard. Andersen depo. At 32-35. Therefore, Andersen engaged Shook Hardy to prepare an analysis of the Trustees' fiduciary duty to apply the prudent man rule in investing KPERS' funds. Andersen depo. At 32. On July 18, 1989, Shook Hardy sent its analysis to Andersen. Plaintiff's Ex. 317. Shook Hardy stated that cases discussing Trustees' investments under the prudent man rule were fact specific although traditionally courts "condemned" investments in new and untried enterprises and in declining corporations. Plaintiff's Ex. 317 at 4.

KPERS' Trustee Thomas A. Hamill stated in his deposition that he met with Andersen on September 7, 1989, to discuss whether direct placement investments met the "prudent man" standard required by the Guidelines. Hamill depo. at 85. Hamill stated that they discussed Shook Hardy's analysis of the prudent man standard. Hamill depo. at 86. See also Anderson depo at 32. Both Hamill and Andersen stated in their depositions that they shared the Shook Hardy opinion with the rest of the Board. Hamill depo. at 86; Andersen depo at 32.

On July 28, 1989, in "A report to Kansas Public Employees Retirement System Board of Trustees," Reimer & Koger once again stated that Home Savings "has positioned itself for significant growth potential and profitability over the next few years." Plaintiff's Supplemental Ex. 24 at 39.

On August 9, 1989, Congress enacted FIRREA, which changed the federal regulators' method used to calculate regulatory capital. Under FIRREA, the Home Savings debentures could no longer be included in its regulatory capital. Affidavit of Leland Gerhard, ¶ 29 at SHB Ex. 14.

On February 16, 1990, the Office of Thrift Supervision (OTS), the successor agency to the FHLBB, issued a Report of Examination for an examination of Home Savings held between May 15, 1989, and December 22, 1989. Plaintiff's Ex. 167. The Report Summary stated, among other things, that "[w]ithout a very substantial infusion of capital, this association is no longer a viable institution." Plaintiff's Ex. 167. As a result of the examination report, Home Savings had extensive meetings with OTS and FDIC regulators concerning Homes Savings' problem commercial loans and the related impact on regulatory capital. Affidavit of Leland Gerhart, ¶ 31 at SHB Ex. 14.

In the spring of 1990, regulators advised Home Savings that it was in violation of regulatory capital requirements. Home Savings began developing a recapitalization plan that included converting outstanding Home Savings debt to preferred stock, which could be included in regulatory capital under FIRREA. Affidavit of Leland Gerhart, ¶ 29 at SHB Ex. 14.

On February 23, 1990, in "A report to Kansas Public Employees Retirement System Board of Trustees," Reimer & Koger stated that as a result of new legislation (FIRREA), "Home Savings existing capital structure no longer meets regulatory guidelines. Management has proposed a capital restructuring plan that includes new equity from the current shareholders." Plaintiff's Supplemental Ex. 25 at 36.

On March 29, 1990, KPERS' $65 million in Home Savings debt instruments were converted to preferred stock. See "Recapitalization Agreement" at Reimer & Koger Ex. 55.

Reimer & Koger retained the Secura Group determined that "Home Savings is insolvent on a tangible capital basis." Plaintiff's Ex. 197 at 4. The Secura Group report stated that it did not offer an opinion as to the appropriateness of the proposed exchange of

subordinated debt for preferred stock nor did it provide any assurances to the success of Home Savings' proposed recapitalization plan. Plaintiff's Ex. 197 at 44.

On March 15, 1991, the OTS closed Home Savings and appointed the RTC as receiver. By letter dated March 15, 1991, to Reimer & Koger, the TRC stated that because "the value of the assets were less than the amount of the liabilities, no assets remain for distribution to shareholders." HSA Ex. 76.

On March 21, 1991, KPERS imposed a moratorium on future KPERS' direct placement investments, except for those which KPERS had entered into legal agreements to make.

KPERS received $29.5 million in interest on its investment in Home Savings.

None of the $65 million was recovered by KPERS. Plaintiff's Supplemental Ex. 28 at 4857. KPERS agrees that its "ultimate recovery following the OTS takeover was in no way different due to the conversion from debt to equity which occurred in March of 1990." See KPERS' response to Reimer & Koger's Statement of Uncontroverted Facts, Number 59.

III.
LEGAL STANDARDS

On July 25, 1995, the Eighth Circuit Court of Appeals held that "the limitations law of the forum state, Missouri, must govern this case." *KPERS v. Reimer & Koger*, 61 F.3d 608, 614 (8th Cir. 1995). "Under Missouri law, KPERS' cause of action will be subject to the five-year Missouri limitation period for fraud, Mo. Rev. Stat. § 526.120(5)(1994), unless 'fully barred' by a shorter statute in the state where the cause originated, Kansas." Id. The Court of Appeals directed me to "apply the Kansas two- and three-year statutes to KPERS' claims if the claims would be 'fully barred' by these statutes." *Id.* at 615.

Missouri's "borrowing statute," Mo. Rev. Stat. § 516.190, provides: "Whenever a cause of action has been fully barred by the laws of the state, territory, or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state." KPERS asserts the following claims in its Sixth Amended Complaint in Case No. 92-0922 and in its Complaint

in Case No. 95-0819: tort, fraudulent misrepresentation, statutory securities violations, breach of contract, professional negligence, and civil conspiracy.

Tort claims are subject to a two-year limitation period in Kansas under K.S.A. § 60-513(a)(4) and to a five-year limitation period in Missouri under Mo. Rev. Stat. § 516.120(4).

K.S.A. § 60-513(b) provides that the cause of action for tort claims "shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or if the fact of injury is not reasonably ascertainable until sometime after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party."

The "fact of injury" refers to the time when plaintiff knew or should have reasonably determined that plaintiffs damages have been caused by an act or omission of a defendant. *Penalosa Cooperative Exchange v. A.S. Polonvi Co.*, 754 F. Supp. 722, 735 (W.D. Mo. 1991); *Cowan v. Lederle Laboratories*, 604 F. Supp. 438, 442 (D. Kan. 1985). *See also Gilder v. Lee Construction Inc.*, 820 P.2d 390, 399 (Kan. 1991).

In order for the limitations period to begin running, the plaintiff does not need to know the full extent of the injury or the full value of the right to sue. *Brueck v. Krinqs*, 638 P.2d 904, 908 (Kan. 1982); *Bryson v. Wichita State University*, 880 P.2d 800, 803 (Kan. Ct. App. 1994); *Gilger*, 820 P.2d at 400; *Pancake House v. Redomond*, 716 P.2d 575, 577 (Kan. 1986); *Alioto v. Marshall Field's & Co.*, 77 F.3d 934, 937 (7th Cir. 1996).

If plaintiff knew or should reasonably have ascertained the fact of injury, the statute of limitations begins running on all of plaintiff's claims against all defendants arising out of the same injury. *Gustavson v. United States*, 655 F.2d 1034, 1036 (10th Cir. 1981) (plaintiff's claims against all defendant doctors was triggered when plaintiff first learned facts on which he could base a claim for negligence against any of the doctors who treated him); *McLouqhlin v. Golf Course Superintendents Ass'n*, 1990 U.S. Dist. LEXIS 11616, *33-34 (D. Kan. 1990)(accrual of claims depends upon knowledge of fact of injury, not knowledge of all actors); see, e.g., *Friends University v. W. R. Grace & Co.*, 608 P.2d 936, 940 (Kan. 1980).

Claims for fraudulent misrepresentation are subject to a two-year limitation period in Kansas under K.S.A. § 60-513(a)(3) and to a five-

year limitation period in Missouri under Mo. Rev. Stat. § 516.120(5).

Under Kansas law, a fraud claim does not accrue until "the~ fraud is discovered." K.S.A. § 60-513(a)(3). The Kansas Supreme Court has construed "discovery" to mean either the time of actual discovery, or when with reasonable diligence there should have been discovery. *Waite v. Adler*, 716 P.2d 524, 525 (Kan. 1986).

In Kansas, claims for a statutory violation are subject to the three-year limitation period provided in K.S.A. § 60-512(2). In Missouri, claims for a statutory violation are subject to the five-year limitation period provided in Mo. Rev. Stat. § 516.120(2).

The Kansas Supreme Court recently determined that the "discovery rule" applies to fraud-based causes of action under the Kansas Securities Act. *Kelly v. Primeline Advisory Inc.*, 889 P.2d 132, 137 (Kan. 1995).

In Kansas, a civil conspiracy claim is subject to the two-year statute of limitations provided in K.S.A. § 60-513(a)(4). Masters v. Daniel International Corn.. No. 87-1290-C, 1991 WL 107410, (D. Kan. May 3, 1991). A conspiracy cause of action in Missouri is subject to the five-year statute of limitations found in Mo. Rev. Stat. § 516.120. *Rippe v. Sutter*, 292 S.W.2d 86, 90 (Mo. 1956).

Claims for breach of a written contract are subject to a five-year limitation under both Kansas law, K.S.A. § 60-512, and Missouri law, Mo. Rev. Stat. § 516.120(1).

Except for the claim for breach of contract asserted against Reimer & Koger, all of KPERS' claims in Case No. 92-0922 and Case No. 95-0819 are subject to a shorter statute of limitations under Kansas law. Therefore, under Missouri's: borrowing statute, if KPERS' claims are fully barred under the shorter Kansas statutes of limitations, defendants will have a complete defense to those claims in this case.

IV.

KPERS' ARGUMENTS OPPOSING SUMMARY JUDGMENT THAT APPLY TO EACH MOTION FOR SUMMARY JUDGMENT

A. KPERS' Claims Are Subject to a Statute of Limitations

KPERS argues that its claims against defendants are not subject to any statute of limitations because limitations periods do not run against governmental entities performing governmental functions.

This is the third time in this case that KPERS has asserted that it was an instrumentality of the State of Kansas performing a governmental function when it invested in Home Savings. On May 3, 1994, I issued an order stating as a matter of law that "the causes of action asserted by KPERS in this case arose out of a proprietary function or activity of KPERS, as opposed to a governmental function." On September 12, 1995, KPERS filed a Motion for Reconsideration on the Question of Whether Its Functions Are Governmental or Proprietary. On October 24, 1995, I issued an order denying KPERS' Motion for Reconsideration stating that when it invested KPERS' funds, KPERS was performing a proprietary function.

For the third time, KPERS was performing a proprietary function when it invested in Home Savings. Therefore, the claims asserted in Case No. 92-0922 and case No. 95-0819 arose out of the performance by KPERS of a proprietary function and are subject to a statute of limitations.

B. KPERS Erroneously Asserts that Its Claims Are Not Subject to a Statute of Limitations Under Missouri Law

KPERS also asserts that its claims against defendants are not subject to a statute of limitations because, under Missouri's common law, claims brought by states are not subject to any statute of limitations.

At common law, statutes of limitation did not apply to actions brought by the state. This concept was expressed by the maxim "No time runs against the Crown" ("Nullum tempus occurrit regi"). *State*

v. Dalton, 182 S.W.2d 311, 312 (Mo. 1944).

The common law concept of 'Nullum tempus occurrit regi' has been abolished by statute in Missouri. Missouri Revised Statute § 516.360 provides that "[t]he limitations prescribed in sections 516.010 to 516.360 shall apply to actions brought in the name of this state." (emphasis added).

KPERS asserts that § 516.360 abolished the common law only for suits brought by or on behalf of the State of Missouri and not for suits brought by other states in Missouri.

The common law rule that "no time runs against the crown" did not apply to political subdivisions of a state. *Emery v. Holt County*, 132 S.W.2d 970, 971 (Mo. 1939). Because KPERS is a political subdivision of the State of Kansas, this common law rule would never have applied to claims asserted by KPERS. Therefore, KPERS' claims against defendants are subject to a statute of limitations under Missouri law.

V.

KPERS' CLAIMS AGAINST THE REIMER & KOGER DEFENDANTS ARE BARRED BY THE STATUTE OF LIMITATIONS

The Reimer & Koger defendants seek summary judgment because they assert that KPERS' claims are fully barred by the Kansas statute of limitations which is shorter than Missouri's five-year statute of limitations.

Reimer & Koger, Inc. asserts that the claim for breach of the Special Investment Advisory Services Agreement (Count III) is really a claim for professional negligence because KPERS asserts that Reimer & Koger failed to perform the terms of the Agreement with due care.

If KPERS' claim in Count III is, in fact, for breach of contract, the Missouri five-year statute of limitations pertaining to actions involving written contracts would apply. If KPERS' claim sounds in tort, the Kansas two-year statute of limitations applies.

A breach of contract claim is based on a failure to perform a duty arising out of or imposed by a contract, whereas a tort claim is based on an alleged violation of a duty imposed by law. *Hunt v. KMG Main*

Hurdman, 839 P.2 45, 47 (Kan. Ct. Supp. 1992). When a claim includes elements of contract and tort, whether the claim sounds in tort or contract is determined by whether the contract calls for a "specific result." *Id.* at 48.

KPERS alleges in Count III that Reimer & Koger breached the Special Investment Advisory Services Agreement because Reimer & Koger 1) failed to perform due diligence on the $50 million Home Savings investment; 2) failed to appropriately structure the $50 million investment because it waived the mandatory redemption privilege; 3) failed to invest KPERS' funds in compliance with the prudent man standard; and 4) failed to monitor Home Savings operations. These are alleged violations of duties imposed by the Agreement and, therefore, these allegations sound in contract. However, KPERS also alleges in Count III that Reimer & Koger failed to report that Russell was a director of Home Savings, that Reimer & Koger could not have believed that the Home Savings investment complied with KPERS' Statement of Investment Policy, that Reimer & Koger should have known that Home Savings was not being operated in a safe and prudent manner, and that Reimer & Koger should have known that Home Savings was insolvent on a tangible capital basis. By these allegations, KPERS is asserting that Reimer & Koger failed to perform the Agreement with due care. Because the law imposes a duty on investment advisers to act with due care, these allegations sound in tort. See *Hecox v. R.G. Dickinson*, 1987 WL 14502, *10 (D. Kan. 1987); *Hill v. Bache Halsey Stuart Shields Inc.*, 790 F.2d 817, 824 n.9 (10th Cir. 1986).

KPERS' allegations in Count III sound both in tort and contract. Therefore, the correct characterization of the claim asserted in Count III depends on whether the contract calls for a specific result. See *Hunt v. KMG Main Hurdman*, 839 P.2d at 49. The Special Investment Advisory Services Agreement did not call for a specific result. For instance, after the financial objectives of the Kansas Investment Fund are listed, the Agreement provided that "in no event shall the Adviser be deemed to have made any representation or warranty that any such objectives will actually be obtained." See Article V. Therefore, the claim asserted in Count III is a claim for professional negligence and is subject to the Kansas two-year statute of limitations for tort claims.

In addition to the professional negligence claim that KPERS asserts against Reimer & Koger in Count III, KPERS asserts the

following tort claims against the Reimer & Koger defendants: gross and wanton negligence (Count IV), breach of fiduciary duty (Count V), and participation in Russell's breach of trust (Count VIII).

KPERS brought suit against the Reimer and Koger defendants on June 5, 1991. Therefore, if any of the tort claims asserted against the Reimer & Koger defendants accrued before June 5, 1989, all of the tort claims against the Reimer & Koger defendants would be barred by the Kansas two-year statute of limitations.

KPERS relies on *Dearborn Animal Clinic v. Wilson*, 806 P.2d 997 (Kan. 1991) for the proposition that the statute of limitations should not begin to run on the claims asserted against defendants until 1991 when the Kansas Joint Legislative Committee investigation revealed that KPERS' investment in Home Savings was imprudent. In *Dearborn Animal Clinic*, plaintiffs sued their attorney for negligence in drafting a contract for the sale of one of plaintiffs' businesses. The attorney asserted that plaintiff's claims were barred by the statute of limitations. The court stated that as a general rule, the statute of limitations would not begin to run in a legal malpractice case until the plaintiffs were damaged as a result of the alleged negligence of the attorney. Generally, whether plaintiffs have been damaged by an attorney's negligence would not be known until it had been determined whether something the attorney did had caused damage. "In a legal malpractice action in which there is underlying litigation which may be determinative of the alleged negligence -of the attorney, . . . the statute of limitations does not begin to fun until the underlying litigation is finally determined." *Id.* at 1006. The Kansas Supreme Court recognized that this rule "cannot be arbitrarily applied in every case" because "the statute begins to run at the time that it is reasonably ascertainable that the injury was caused by the attorney's malpractice even though the underlying action may not have been finally resolved." *Id.* at 1006.

In *Dearborn*, the court did not apply this general rule because it concluded plaintiffs knew enough facts before the underlying litigation was resolved to put them on notice of the attorney's negligence. *Id.* at 1006-1007. Here, as in *Dearborn*, the outcome of a separate proceeding such as the Kansas Joint Legislative Committee investigation was not needed in order for KPERS to reasonably ascertain the fact of injury resulting from its Home Savings

investment.

KPERS' tort claims against the Reimer & Koger defendants for professional negligence, gross and wanton negligence, breach of fiduciary duty, and participation in Russell's breach of trust are all based, among other things, on the allegations that the Reimer & Koger defendants failed to notify KPERS that its $50 million investment would not be used to purchase a St. Louis savings and loan and that the Reimer & Koger defendants failed to notify KPERS about Michael Russell's potential conflict of interest. Specifically, KPERS alleges that it would not have made the $65 million investment in Home Savings if it had known 1) that plaintiff's $50 million would not be used to purchase a St. Louis savings and loan or 2) that Michael Russell had a potential conflict of interest. Transcript of hearing on February 21, 1996, at 112,.134. KPERS' focus on the damage it, allegedly suffered at the time the investment in Home Savings was made is dictated by KPERS need to prevent the RTC from asserting ownership of KPERS' claims as being based on alleged mismanagement of Home Savings. *See* Transcript of hearing on February 21, 1996 at 115; *see also* Suggestions in Opposition to the Reimer & Koger Defendants' Motions for Summary Judgment at 5.

Because KPERS concedes that it was injured when the investments were made, the statute of limitations began to run on KPERS' tort claims when the fact of that injury was reasonably ascertainable by KPERS. Therefore, when KPERS learned either that its funds were not going to be used to purchase a St. Louis savings and loan, or that Russell was a director of Home Savings, or that Russell had obtained loans from Morgan banks, KPERS knew or reasonably should have been aware that its money had been invested improperly.

KPERS had actual knowledge by December 1986 that Home Savings was no longer seeking to acquire a St. Louis savings and loan. Information distributed to the KPERS trustees on September 19, 1986, revealed that KPERS' $50 million investment was going to be used by Home Savings for general corporate purposes. Koger states in his affidavit that he sent Crowther a copy of an October 1986 memorandum stating that the St. Louis acquisition was "probably dead." Koger also states in his affidavit that he orally told Crowther that the acquisition of the St. Louis savings and loan was unlikely. Moreover, a November 13, 1986, *Kansas City Star* article stated that Home Savings was no longer seeking to acquire a St. Louis savings

and loan. Koger sent a copy of the article to Crowther who sent a copy of the article to all KPERS' Trustees.

In January and February 1986, Ken Koger notified Crowther that Russell was a member of Home Savings' Board of Directors and that his position might cause a conflict. Furthermore, in December 1986, *The Kansas City Star* published an article questioning whether Russell's relationship with Morgan and Morgan-owned banks presented a conflict of interest. The reactions of two KPERS' Trustees to the allegations were quoted in the article. As a result of the newspaper article, the Kansas Attorney General conducted an investigation into Russell's alleged conflict of interest. The results of the investigation were published in March 1987. Even though this investigation concluded that there was no conflict of interest, KPERS knew by December 1986 enough about Russell's relationship with Morgan and Home Savings to reasonably ascertain the injury it now claims it suffered when it invested in Home Savings without the knowledge of Russell's alleged conflict.

Furthermore, even if KPERS' injury was not reasonably ascertainable from facts actually known to KPERS, the-knowledge of KPERS' agents would be imputed to KPERS because Kansas recognizes the general rule that knowledge obtained by an agent within the scope of his authority is imputed to the principal. *City of Arkansas City v. Anderson*, 762 P.2d 183, 189 (Kan. 1988). K.S.A. § 74-9421(7) states that KPERS' investment advisers are its agents for purposes of actions taken within the scope of their authority. Acquiring information about investments was within the scope of Reimer & Koger's authority. Therefore, the Reimer & Koger defendants were KPERS' agents for that purpose.

KPERS argues that Reimer & Koger's knowledge should not be imputed to KPERS because Reimer & Koger acted adversely to KPERS. Under Kansas law, knowledge will not be imputed from an agent to a principal when the agent acts adversely to the principal's interest. *Supreme Petroleum, Inc. v. Briggs*, 433 P.2d 373, 378 (1967). The adverse agent exception applies when an agent abandons his principal's interests and acts entirely for his own purposes. *Id.* at 378; see also *In re Crazy Eddie Securities Litigation*, 802 F. Supp. 804, 817 (E.D.N.Y. 1992). When acting adversely to his principal and entirely for his own purposes, an agent is presumed to not fulfill his fiduciary duty of full disclosure to the principal. *Supreme Petroleum*,

433 P.2d at 378; see also *First' National Bank of Cicero v. Lewco Securities Group,* 860 F.2d 1407, 1418 (7th Cir. 1988).

However, under an "exception to the exception" to the general imputation rule, knowledge of the agent who is acting adversely will be imputed to the principal when the agent is the sole representative of the principal. *Supreme Petroleum*, 433 P.2d at 378. The agent who is the sole representative of a principal may properly be considered the alter ego of the principal. *Id.* "In such a case, if the principal asserts or stands on the transaction, either affirmatively or defensively, or seeks to retain the benefits of the transaction, he is charged with the agent's knowledge." *Id.*

KPERS has not presented properly under Rule 56 facts that would permit a finder of fact to reasonably conclude that the Reimer & Koger defendants totally abandoned KPERS' interests and acted only to further their own interests. Hence, the adverse agent exception to the general imputation rule does not insulate KPERS from the knowledge of its agents, the Reimer & Koger defendants.

However, even if the adverse agent exception to the general agency rule applied, Reimer & Koger was KPERS' sole agent in making the Home Savings investments, and KPERS has retained the benefit of the $29.5 million in interest payments made by Home Savings to KPERS before Home Savings was put in receivership. Therefore, under the exception to the exception, KPERS is charged with any knowledge that the Reimer and Koger defendants had that would have made the fact of injury reasonably ascertainable.

Reimer & Koger had actual knowledge in October 1986 that the St. Louis acquisition was "probably dead." Koger knew in January 1986 that Russell was on the Board of Directors of Home Savings. Koger stated that he read the December 21, 1986, *Kansas City Star* article about Russell's alleged conflict of interest.

Accordingly, no later than December 1986, KPERS knew or could reasonably have ascertained that its money had been invested in Home Savings under unacceptable circumstances. In addition, it knew that the Reimer & Koger defendants had analyzed Home Savings as a potential investment and had recommended the Home Savings investment. Because by that time KPERS knew facts upon which it could have based one or more of the claims asserted against the Reimer & Koger defendants in this case, the statute of limitations began to run on KPERS' claims against the Reimer & Koger

defendants by December 1986. See *Pancake House v. Redmond*, 716 P.2d 575, 577 (Kan. 1986); *Bryson v. Wichita State University,* 880 P.2d at 803.

KPERS admits that there is evidence on this record that KPERS knew that Home Savings did not purchase a St. Louis savings and loan. Transcript of February 21, 1996, hearing at 113-114. However, KPERS asserts that it "had to sue [defendants] on [the St. Louis savings and loan issue] within two years. Otherwise, they waive it. But that does not waive claims for mismanagement or other breaches of fiduciary duty, lying to KPERS that KPERS ha[d] no knowledge of, none whatsoever." Transcript of February 21, 1996, hearing at 114.

KPERS' argument that it could waive its right to bring certain claims while preserving its right to bring other claims is based on a misconception of Kansas law.

The fact that KPERS may have learned additional facts after December 1986 about the involvement of the Reimer & Koger defendants and the other defendants relating to KPERS' investment in Home Savings does not cause a new limitations period to begin. That KPERS would vigorously investigate during the limitations period and discern additional claims and additional defendants is consistent with the purpose of a statute of limitations to limit the time in which all claims pertaining to a single damage may be asserted. Therefore, KPERS' lack of knowledge by December 1986 about the full extent of its injury, i.e., about all of the claims it now asserts against the Reimer & Koger defendants and the other defendants arising from the Home Savings investment, did not prevent the statute of limitations from beginning to run on all of those claims in December 1986. See *Gustavson v. United States,* 665 F.2d at 1036; see e.g. *Friends University v. W.R. Grace & Co.*, 608 P.2d at 940.

In addition to what KPERS knew by December 1986, KPERS had actual knowledge of other facts that would have triggered the two-year statute of limitations before June 5, 1989. For example, KPERS alleges that it would not have invested in Home Savings had it known that Home Savings was engaged in risky commercial and real estate lending or that Home Savings was in violation of the banking regulations and Standby Purchasers Agreement.

In a February 6, 1996, memo to Crowther, Koger stated that Home Savings was taking credit risk and that its focus would be on commercial and real estate lending.

Furthermore, Koger testified that he discussed with Crowther a September 8, 3988, *Kansas City Business Journal* article that stated that Home Savings had shifted it emphasis to commercial real estate lending and that Home Savings was in violation of banking regulations and the Standby Purchasers' Agreement.

KPERS' agents, the Reimer & Koger defendants, knew no later than by September 1988 that Home Savings was engaged in risky commercial and real estate lending and that it had engaged in transactions with affiliated in violation of the Standby Purchasers Agreement. For example, Koger stated at his deposition that he became aware during his review of homes Savings' records that it planned to take credit risk. Koger depo. At 646. In an August 30, 1988, memo to Ken Koger, Robbin Reynolds stated that she had discussed with potential sellers in the secondary market the price at which the Homes Savings subordinated debentures could be sold. Reynolds stated that the debentures would have to sell at a deep discount, in part, because of Home Savings' credit problems resulting from its risky commercial lending practices. Koger read the September 12, 1988, *Kansas City Business Journal* article outlining Home Savings' practice of engaging in risky commercial lending and Home Savings' violations of banking regulations. In a November 28, 1988, memorandum, Linda Faucett noted that Home Savings was doing a considerable amount of commercial real estate lending, which is riskier than traditional residential property lending. Finally, in Marcy 1989, Reynolds and Faucett wrote memos to the "HSA file" that discussed Home Savings' continuing violations of the Standby Purchasers Agreement and Home Savings' strategy in taking credit risk and Home Savings' increasing commercial loan delinquencies.

Therefore, by March 1989, KPERS knew or should have reasonably ascertained even more facts than it knew by December 1986 which should have alerted KPERS to the damage it now says it incurred when it invested in Home Savings. These same facts would have revealed to KPERS additional bases for asserting claims against the Reimer & Koger defendants and others.

KPERS argues that because the Reimer & Koger defendants concealed information about Home Savings, the statute of limitations was tolled on its claims against the Reimer & Koger defendants. Under Kansas law, in order "[t]o constitute concealment of a cause of action within the general rule tolling the statute of limitations on that

ground the concealment must be fraudulent or intentional." *Friends University*, 608 P.2d at 941. The party alleging concealment must "explain why due diligence did not lead or could not have led to discovery of the facts and the cause of action." *Id.*

No facts on this record could lead a reasonable finder of fact to conclude that the Reimer & Koger defendants fraudulently or intentionally concealed information from KPERS. To the contrary, Koger regularly shared information with Crowther. He sent memoranda about the due diligence investigation the Reimer & Koger defendants performed on Home Savings. Koger notified Crowther when he learned that Russell was a Home Savings board member. He sent Crowther the newspaper article stating that Home Savings was no longer seeking to purchase a St. Louis Savings and Loan and he discussed with Crowther the newspaper article concerning Home Savings' regulatory violations. Moreover, KPERS does not explain why due diligence on its part did not lead to or could not have led to the discovery before June 5, 1989, of the facts upon which it bases its claims against Reimer & Koger, or the other defendants. Therefore, KPERS has not demonstrated that concealment by the Reimer & Koger defendants tolled the statute of limitations on KPERS' claims against the Reimer & Koger defendants.

Because the fact of injury resulting from KPERS' investment in Home Savings was reasonably ascertainable before June 5, 1989, the tort claims asserted in this case against the Reimer & Koger defendants are fully barred by the Kansas two-year statute of limitations. Therefore, the Reimer & Koger defendants have a complete defense to those claims under Missouri law. See Mo. Rev. Stat. § 516.190.

Accordingly, the Reimer & Koger defendants' Motions for Summary Judgment on the tort claims asserted against them in Counts III, IV, V, and VIII will be granted.

In Count IX, KPERS asserts that Ken Koger was involved in a conspiracy to "obtain KPERS money for Home Savings and thereby to benefit" himself. Complaint at ¶ 165.

A civil conspiracy claim is governed by the two-year statute of limitations at K.S.A. § 60-513(a)(4). *Masters v. Daniel International Corn., No. 87-1290-C*, 1991 WL 107410 (D. Kan. May 3, 1991).

"Conspiracy is not actionable without commission of some wrong giving rise to a cause of action independent of the conspiracy." *Stoldt*

v. City of Toronto, 678 P.2d 153 (1984). Therefore, the plaintiff must prevail on a claim against a defendant before the plaintiff can maintain an action for the conspiracy to commit that wrong. *Masters*, 1991 WL at *7.

Because the tort claims asserted against the Reimer & Koger defendants are barred by the statute of limitations, KPERS' civil conspiracy claim against Ken Koger is barred also. Therefore, Koger has a complete defense under Missouri law, Mo. Rev. Stat. § 516.190, against KPERS' civil conspiracy claim. Koger's Motion for Summary Judgment on Count IX will be granted.

VI.

KPERS' CLAIMS AGAINST THE HSA DEFENDANTS AND FRANK SEBREE ARE FULLY BARRED BY THE STATUTE OF LIMITATIONS

KPERS asserts two tort claims against the HSA defendants and Frank Sebree: participation in Reimer & Koger's breach of fiduciary duty (Count VI) and participation in Michael Russell's breach of trust (Count VIII).

Because KPERS brought suit against the HSA defendants and Sebree on December 23, 1991, KPERS' tort claims asserted against the HSA defendants and Sebree are barred by the Kansas two-year statute of limitations if the statute began running before December 23, 1989. Therefore, the issue is whether on the undisputed facts of this case KPERS could have reasonably ascertained the fact of injury relating to KPERS' investment in Home Savings before December 23, 1989.

By December 1986 KPERS had actual knowledge of Russell's alleged conflict of interest and of Home Savings' decision not to purchase a St. Louis Savings and Loan with KPERS $50 million investment. For the reasons stated above concerning the Reimer & Koger defendants, the knowledge KPERS had by December 1986 was sufficient to put KPERS on notice that it had been damaged when it invested in Home Savings and that the Reimer & Koger defendants had caused some or all of the damage. Therefore, the statute of limitations began to run by December 1986 on all claims arising from that injury, i.e., the investment in Home Savings, including any claims

against the HSA defendants and Sebree. See *Gustavson*, 655 F.2d at 1037; see, e.g, *Alioto v. Marshall Fields & Co.*, 77 F.3d at 937. When KPERS failed to file its tort claims against the HSA defendants and Sebree within two years thereafter, KPERS' tort claims against the HSA barred by the two-year statute of within two years thereafter, defendants and Sebree were limitations.

Because the tort claims asserted against the HSA defendants and Sebree are fully barred by the Kansas two-year statutes of limitations, the HSA defendants and Sebree have a complete defense to KPERS' tort claims in this case. See Mo. Rev. Stat. § 516.190. Thus, the HSA defendants' and Sebree's Motion for Summary Judgment on KPERS' tort claims asserted against them in Counts VI and VIII will be granted.

In Count I, KPERS asserts that the HSA defendants and Sebree made fraudulent misrepresentations to KPERS concerning the Home Savings investment. Specifically, KPERS' alleges that Frank Morgan misrepresented that Home Savings was going to use the $50 million to purchase a St. Louis savings and loan. Complaint, ¶ 64. KPERS also alleges that "in his capacity as general counsel and secretary of Home Savings, and on behalf of the Home Savings Board of Directors . . ., and Morgan, Dreiseszun, [and] Ozar, and himself, Sebree, stated in three opinion letters that Home Savings was "not in violation of any agreement, instrument statute, rule or government regulation applicable to it." Complaint, ¶ 63.

Claims for fraudulent misrepresentation are subject to a two-year limitation period in Kansas, K.S.A. § 60-513(a)(3). Under Kansas law, a fraud claim does not accrue until "the fraud is discovered." K S.A. § 615(a)(3). The Kansas Supreme court has construed "discovery" to mean either the time of actual discovery, or when a plaintiff should have reasonably discovered the alleged fraud. *Waite v. Adler*, 716 P.2d 524, 525 (Kan. 1986); see also *Schrag v. Dinges*, 788 F. Supp. 1543, 1549 (D. Kan. 1992).

Because of the knowledge KPERS had by March 1989, as discussed in connection with the Reimer & Koger defendants, KPERS knew or reasonably should have discovered the alleged fraud well before December 23, 1989. Under Kansas law, once a plaintiff ascertains the fact of injury the statute of limitations begins to run on all plaintiffs' claims against all defendants for the same injury. See *Gustavson v. United States*, 655 F.2d at 1037. See, e.g., *Friends*

University v. W.R. Grace Co., 608 F.2d 936 (Kan. 1980).

Therefore, the statute of limitations for KPERS' claims against the HSA defendants and Sebree for fraudulent misrepresentation began to run before December 23, 1989. Because KPERS did not assert its claim for fraudulent misrepresentation against the HSA defendants and Sebree until December 23, 1991, over two years after KPERS' fraudulent misrepresentation claims against the HSA defendants and Sebree were not timely filed.

Even if the claims against the HSA defendants and Sebree were considered separately, the statute of limitations on these claims started to run before December 23, 1989. KPERS asserts in Count I that Morgan made a misrepresentation that the $50 million was to be used to purchase a St. Louis savings and loan. Complaint, ¶ 64. However, KPERS concedes that it had knowledge that the $50 million was not to be used to purchase a St. Louis savings and loan, and thus, it had no-claim for misrepresentation against Morgan. Transcript of February 21, 1996, hearing at 113.

KPERS also asserts in Count I that in opinion letters dated May 2, 1986, November 19,- 1986, and December 8, 1987, the HSA defendants and Sebree represented that Home Savings was not in violation of any banking regulations. Complaint, ¶ 63. For the reasons stated above concerning the Reimer & Koger defendants, KPERS knew that Home Savings was engaging in regulatory violations before December 23, 1988, and could have asserted claims against the HSA defendants and Sebree before that date.

Furthermore, even if the statements in the December 8, 1987, opinion letter are considered as separate misrepresentations from those made in the May 2, 1986, and November 19, 1986, opinion letters, no facts have been presented supporting a causal connection between statements in the December 8, 1987, opinion letter and the damage KPERS claims. Under KPERS' theory, KPERS was injured when Reimer & Koger transferred the final $50 million of KPERS' KIF funds to Home Savings on September 30, 1986. Therefore, any statement made after that date could not have been a cause of KPERS' $65 million injury.

Because KPERS' claims for fraudulent misrepresentation against the HSA defendants and Sebree are barred by the applicable Kansas statute of limitations, the HSA defendants and Sebree have a complete defense under Missouri law to KPERS' fraudulent misrepresentation

claim. See Mo. Rev. Stat. § 516.190. Accordingly, the HSA defendants' and Sebree's Motions for Summary Judgment will be granted on -the claim asserted in Count I.

In Count II, KPERS asserts a statutory securities fraud claim against the HSA defendants and Sebree. KPERS alleges that in violation of K.S.A. § 17-1252(j) Home Savings offered and sold to KPERS $65 million in interim promissory notes and debentures by means of an untrue statement of material fact or by the omission of a material fact necessary to make the statements not misleading in light of the circumstances under which they were made. Complaint, ¶ 76.

In Kansas, claims for a statutory violation are subject to the three-year limitation period provided in K.S.A. § 60-512(2). A fraud-based cause of action under the Kansas Securities Act accrues when the plaintiff discovers or reasonably should have discovered the facts necessary to support a claim. *Kelly v. Primeline Advisory. Inc.*, 889 P.2d 132, 137 (Kan. 1995) (discovery rule applies to claims for statutory securities fraud).

For the reasons stated above in considering KPERS' claims against the HSA defendants and Sebree for common law fraudulent misrepresentation, the statute of limitations began to run before December 23, 1988. Therefore, the statute of limitations had expired on KPERS' claim for statutory securities fraud by December 23, 1991. Under Mo. Rev. Stat. § 516.190, the HSA defendants and Sebree have a complete defense against KPERS statutory securities fraud claim asserted against them. Therefore, the HSA defendants and Sebree's Motions for Summary Judgment on the claim asserted in Count II will be granted.

In Count IX, KPERS asserts a civil conspiracy claim against the HSA defendants and Sebree. Specifically, KPERS asserts that the HSA defendants and Sebree engaged in a conspiracy to "obtain KPERS money for Home Savings and thereby to benefit" themselves. Complaint, ¶ 165.

For the same reasons that KPERS' civil conspiracy claim against Ken Koger is barred by the Kansas two-year statute of limitations, KPERS' civil conspiracy claim against the HSA defendants and Sebree is barred by the Kansas two-year statute of limitations.

Because the HSA defendants and Sebree have a complete defense under Mo. Rev. Stat. § 516.190 to the civil conspiracy claims asserted against them, the HSA defendants' and Sebree's Motions for

Summary Judgment on Count IX will be granted.

VII.

KPERS' CLAIMS ASSERTED AGAINST SHOOK HARDY ARE BARRED BY THE STATUTE OF LIMITATIONS

Shook Hardy asserts that on the undisputed facts on this record, KPERS' claims asserted against it were untimely filed and are barred by the applicable statute of limitations.

In response to Shook Hardy's Motion for Summary Judgment, KPERS argues that Shook Hardy waived its right to assert a statute of limitations defense when it intervened in this case. Alternatively, KPERS asserts that the claims should be deemed to have been brought on June 5, 1991, the date this case was filed in Kansas state court. Finally, KPERS asserts that its claims against Shook Hardy were timely filed.

Once a party intervenes, the intervener has the same standing as an original party and is entitled to fully litigate all defenses. *Alvarado v. J.C. Penney Co. Inc.*, 997 F.2d 803, 805 (lOth Cir. 1993); see also Schneider v. Dumbarton Developers Inc., 767 F.2d 1007, 1017 (D.C. Cir. 1985); *Brown v. Demco Inc.*, 792 F.2d 478, 481 (5th Cir. 1986). Therefore, intervening parties may raise a defense based on the statute of limitations.

Northampton County Drainage Dist. No. One v. Bailey, 373 S.E.2d 560 (N.C. Ct. App. 1988), *rev'd in part*, 392 S.E.2d 352 (N.C. 1990), relied on by KPERS, does not support persuasively the proposition that Shook Hardy waived its statute of limitations defense when it intervened in Case No. 92-0922. *Northampton County* involved a defendant intervener who "waived his right to plead the statue of limitations as a matter of law by failing to assert that defense in the former action in which he paid the assessments that he now claims are barred." *Id.* at 564. Shook Hardy did not fail to assert the statute of limitations in a former case.

KPERS mistakenly asserts that because Shook Hardy intervened in Case No. 92-9022, the original filing date of that case, June 5, 1991, should be used for statute of limitations purposes. The date a successful motion to intervene is filed is the date used to determine compliance with a statute of limitations. *United States v. Randall &*

Blake, 817 F.2d 1188, 1192 (5th Cir. 1987); *Braxton v. Virginia Folding Box Co.*, 72 F.R.D. 124, 126 (E.D. Va. 1976); *Jack v. Travelers Insurance Co.*, 22 F.R.D. 318 (E.D. Mich. 1958), *aff'd*, 277 F.2d 736 (6th Cir. 1960);

Therefore, October 14, 1994, the date that Shook Hardy sought to intervene as a defendant in Case No. 92-0922 is the relevant date for determining whether the statute of limitations has run on KPERS' claims against Shook Hardy. Unless the statute of limitations began to run on plaintiff's tort claims against Shook Hardy after October 14, 1992,, the tort claims against Shook hardy were filed after expiration of the two-year statute of limitations found in K.S.A. § 60.513.

KPERS asserts the following tort claims against Shook Hardy: participation in Reimer & Koger's breach of fiduciary duty (Count VI), participation in Russell's breach of trust (Count VIII), negligent misrepresentation (Count X), and breach of fiduciary duty (Count XI).

For the reasons stated above with regard to the Reimer & Koger defendants, KPERS knew or should have known by December 1986 that it had been damaged when it invested in Home Savings and that the Reimer & Koger defendants caused the damage. Once KPERS determined the facts upon which it could base a claim against one defendant, the statute of limitations was triggered for all claims arising out of the same injury, even if KPERS was not aware of the full extent of its injury when the statute of limitations began to run. Therefore, under Kansas law, the statute of limitations began to run before October 14, 1992, on all claims arising from the injury KPERS suffered when it invested in Home Savings, including any claims against Shook, Hardy. When KPERS failed to file its tort claims against Shook, Hardy by December 1988, KPERS' tort claims against Shook, Hardy were barred by the Kansas two-year statute of limitations.

Even if the claims against Shook Hardy were considered separately from the claims against other defendants, KPERS' claims against Shook Hardy would be fully barred by the Kansas two-year statute of limitations. By June 5, 1991, when KPERS brought suit against the Reimer & Koger defendants in Case No. 92-0922, KPERS knew that it had a claim for the damage sought in this case, i.e., its investment in Home Savings. Furthermore, KPERS knew that this damage was allegedly caused by the act or omission of a defendant. Thus, the statute of limitations for claims against Shook Hardy arising

out of the investment in Home Savings began running no later than June 5, 1991. Any tort claims filed against Shook Hardy after June 5, 1993, were barred by the statute of limitations. Because Shook Hardy did not move to intervene until October 14, 1994, KPERS' tort claims against Shook Hardy are fully barred by the Kansas two-year statute of limitations. Shook Hardy was a complete defense to those claims under Missouri law. *See* Mo. Rev. Stat. § 516.190.

Accordingly, Shook Hardy's Motion for Summary Judgment on the claims asserted against it in Counts VI. VIII, X and XI in Case No. 92-0922 will be granted.

VIII.

KPERS CLAIMS AGAINST BLACKWELL SANDERS ARE FULLY BARRED BY THE STATUTE OF LIMITATIONS

Blackwell Sanders asserts that summary judgment should be granted in its favor because KPERS' claims in Case No. 95-0819 are barred by the statute of limitations.

Blackwell Sanders was originally sued by KPERS in Kansas state court on Janaury [sic] 6, 1995. Blackwell filed a Third-Party Complaint against the RTC as receiver of Home Savings. The RTC removed the case to this court pursuant to FIRREA, 28 U.S.C. § 1441(a)(1) and it is now Case No. 95-0819.

KPERS argues that I should not consider Blackwell Sanders' Motion for Summary Judgment because, once the claims against the RTC are dismissed as frivolous, the case should be remanded to the Kansas district court.

In *KPERS v. Reimer & Koger*, 61 F.3d 608, 610 (8th Cir. 1995), the Eighth Circuit Court of Appeals stated that: "Under § 1441a(1), any suit to which the RTC is a party is 'deemed to arise under the laws of the United States,' and the district courts therefore have original jurisdiction over such suits. This grant of jurisdiction includes the entire suit, even though the RTC was only a third-party defendant."

Because § 1441a(1) provides federal jurisdiction over all the claims contained in this case, there is no need to inquire into supplemental jurisdiction when the federal claims are dismissed. See *Spring Garden Associates L.P. v. RTC*, 26 F.3d 412, 417 (ad Cir. 1994); see also *California v. Heating*, 986 F.2d 346, 348-49 (9th Cir.

1993) (adding the RTC to a case "transforms the entire action into one that 'arises under' the laws of the United States). Because original jurisdiction exists over all claims asserted in Case No. 95-0819, this case will not be remanded to the Kansas District Court even if the Third-Party Complaint against the RTC is dismissed. KPERS' request to stay the consideration of Blackwell Sanders' Motion for Summary Judgment will be denied.

KPERS next asserts that when Blackwell Sanders intervened in this lawsuit, it waived its right to assert a statute of limitations defense. The Eighth Circuit Court of Appeals stated in *KPERS v. Reimer & Koger*, 16 F.3d 1305, 1308 (8th Cir. 1995), that Blackwell Sanders could intervene as a matter of right in Case No. 92-0922. However, KPERS has never amended its Complaint to assert claims against Blackwell Sanders in Case No. 92-0922. The only case pending before this court in which Blackwell is a party is the case removed from the Kansas District Court, Case No. 95-0819. Because Blackwell Sanders has not intervened in Case No. 92-0922, KPERS' argument that Blackwell Sanders' alleged intervention in Case No. 92-0922 fails. Even if Blackwell Sanders had intervened in Case No. 92-0922, KPERS' argument would fail For the reasons stated in rejecting the same argument with regard to Shook Hardy.

In Case No. 95-0819, KPERS asserts claims for professional negligence (Count I), breach of fiduciary duty (Count II), participation in Reimer & Koger's breach of trust (Count III) and participation in Russell's breach of trust (Count IV). Because KPERS' claims asserted against Blackwell Sanders in Case No. 95-0819 all sound in tort, the two-year statute of limitation found in K.S.A. § 60-513 applies to those claims.

KPERS filed suit against Blackwell Sanders in Kansas state court on January 6, 1995. Therefore, the claims asserted in that suit must have accrued after January 6, 1993, to avoid being barred by the Kansas two-year statute of limitations.

For the reasons stated above concerning the Reimer & Koger defendants, the fact of injury relating to its investment in Home Savings was known long before January 6, 1993. Therefore, under Kansas law, the statute of limitations began to run before January 6, 1993, on all claims arising from that damage, including any claims against Blackwell Sanders, even if KPERS was unable to determine the full extent of its injury when the statute of limitations began to

run. Therefore, when KPERS failed to file its tort claims against Blackwell Sanders before January 6, 1993, KPERS' tort claims against the Blackwell Sanders were barred by the two-year statute of limitations.

Even if the claims against Blackwell Sanders were considered separately from the claims against other defendants, the Statute of limitations on KPERS' claims against Blackwell Sanders began to run on June 5, 1991, when KPERS brought suit against the Reimer & Koger defendants. By that time, KPERS knew that it had a claim for the damage sought in Case No. 95-0819, i.e., its investment in Home Savings, and believed that the damage was caused by the act or omission of a defendant. Any tort claim filed against Blackwell Sanders after June 5, 1993, was barred by the statute of limitations. Because KPERS did not assert its tort claims against Blackwell Sanders until January 6, 1995, KPERS' tort claims against Blackwell Sanders-are fully barred by the Kansas two-year statute of limitations. Blackwell Sanders has a complete defense to these claims under Missouri law. See Mo. Rev. Stat. § 516.190.

Accordingly, Blackwell Sanders' Motion for Summary Judgment on Counts I, II, III and IV of the Complaint in Case No. 95-0819 will be granted.

X.

CONCLUSION

For the reasons stated, it is ORDERED that:

1) the HSA defendants' Motion for Summary Judgment based on the statute of limitations is granted;

2) Frank Sebree's Motion for Summary Judgment based on the statue of limitations is granted, . . .

3) Reimer & Koger's Motion for Summary Judgment based on the statute of limitations is granted;

4) Ken Koger's Motion for Summary Judgement based on the statute of limitations is granted;

5) Ron Reimer's Motion for Summary Judgment based on the statute of limitations is granted;

6) Brent Messick's and Robert Crew's Motion for Summary Judgment based on the statute of limitations is granted;

7) Clifford Shinski's Motion for Summary Judgment based on the statute of limitations is granted;

8) Shook, Hardy & Bacon's Motion for Summary Judgment based on the statute of limitations is granted;

9) KPERS request to stay consideration of Blackwell, Sanders, Matheny, Weary & Lombardi's Motion for Summary Judgment is denied; and

10) Blackwell, Sanders, Matheny, Weary & Lombardi's Motion for Summary Judgment based on the statute of limitations is granted.

/s/
D. BROOK BARTLETT
UNITED STATES DISTRICT COURT

Kansas City, Missouri

June 3, 1996.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	
v.	
REIMER & KOGER ASSOCIATES, INC., *et al.*, *Defendants.*	
	No. 92-0922 CV-W-9
FRANK MORGAN, et al., *Defendants and Third-Party Plaintiffs,*	
v.	
RESOLUTION TRUST CORPORATION, *Third-Party Defendant.*	Filed June 3, 1996
KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	No. 95-0819
v.	CV -W-9
BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C., et al., *Defendants and Third-Party Plaintiffs,*	
v.	
RESOLUTION TRUST CORPORATION, *Third Party Defendant.*	

ORDER GRANTING DEFENDANTS' MOTION FOR FINAL JUDGMENT PURSUANT TO RULE 54 AND GRANTING DEFENDANTS' MOTION FOR PERMANENT INJUNCTION

On June 3, 1996, I issued an order granting summary judgment in favor of Reimer & Koger Associates, Inc., Kenneth Koger, Ron Reimer, Clifford Shinski, Brent Messick, and Robert Crew (the Reimer & Koger defendants); I.I. Ozar, Sherman Dreiseszun, and the Estate of Frank Morgan (the HSA defendants); Frank Sebree; and Shook, hardy & Bacon (Shook Hardy) because KPERS' claims asserted against those defendants are barred by the applicable Kansas statute of limitations.

After the June 3, 1996, order was issued, the HSA defendants moved for a final judgment under Rule 54(b), Federal Rules of Civil Procedure.

During a hearing on June 28, 1996, the Reimer & Koger defendants, Shook hardy and frank Sebree, joined in the HSA defendants' motion. KPERS' counsel stated that KPERS did not oppose te motion as long as all parties whose summary judgment motions were decided in the June 3, 1996, order were included in the Rule 54(b) final judgment.

Rule 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

No just reason exists for delay in entering a final judgment pursuant to Rule 54(b), in favor of all the defendant in Case No. 92-0922 who prevailed in the June 3, 1996, order. Thus, defendants' Motion for a Final Judgement Under Rule 54(b) will be granted.

Also during the June 28, 1996, hearing, Shook hardy's counsel requested that as part of the Rule 54(b) final judgment entered in this case the preliminary injunction entered on September 28, 1995, be made permanent. (The preliminary injunction prohibited

KPERS from filing, in any other court, claims against the defendants named in that order arising out of KPERS' investments in Home Savings.) Defendant Frank Sebree joined in the motion. KPERS requested an opportunity to file a written response to he oral motion.

On July 5, 1996, I issued an Order Directing KPERS to Show Cause Why Permanent Injunction Should Not Issue.

By letter dated July 16, 1996, KPERS responded to the Show Cause order. In its letter, KPERS states that it opposes the request that a permanent injunction be entered for all the reasons it objected to the entry of the preliminary injunction. In addition, KPERS asserts that Shook hardy has not articulated any good cause for a permanent injunction.

After receiving an adverse ruling on the statute of limitations from the Eighth Circuit Court of Appeals, KPERS brought suit in Kansas against Blackwell Sanders Matheny Weary & Lombardi (Blackwell Sanders) and many of the defendants in Case No. 92-0922 asserting the same claims that had been pending for years in this court. Without the injunction I entered on September 28, 1995, I am persuaded that KPERS might again embark on a program of suing the defendants in Case No. 92-0922 and Balckwell [sic] Sanders in Kansas asserting the same claims asserted in those cases. For this reason, I restate as if fully set out in this order the findings of facts and conclusions of law stated on the record at the September 28, 1995, hearing when I granted Defendants' motion for preliminary injunction relief. In order to protect the jurisdiction of this court and to protect defendants from needless expense and repetitive litigation, defendants' motion that KPERS be permanently enjoined form bringing suit against them in any other court for claims arising out of KPERS' investment in Home Savings will be granted.

Accordingly, it is ORDERED that:

1) because there is no just reason for delay and of the reasons stated in the order dated June 3, 1996, judgment is entered in favor of I.I. Ozar, the Estate of Frank Morgan, Sherman Dreiseszun, Frank Sebree, Reimer & Koger Associates, Inc., Ron Reimer, Ken Koger, Clifford Shinski, Brent Messick, Robert Crew and Shook Hardy and Bacon and against plaintiff on all claims asserted against these defendants in plaintiff's Amended Complaint;

2) defendants' request that the September 28, 1995, preliminary injunction be made permanent is granted.

3) KPERS is permanently enjoined from filing in any other court, claims arising out of KPERS' investments in Home Savings against the following defendants: Shook Hardy and Bacon; Frank Sebree; KPMG Peat Marwick; Robert W.L. Spence; Reimer & Koger Associates, Inc.; Ronald Reimer; Kenneth Koger; Robert Crew; Clifford Shinski; Brent Messick; and Blackwell Sanders Matheny Weary & Lombardi; and

4) the $500 bond submitted to the Clerk of the Court by each defendant at the time the preliminary injunction was entered shall be applicable to the permanent injunction.

/s/
D. BROOK BARTLETT
UNITED STATES DISTRICT COURT

Kansas City, Missouri

July 22, 1996.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	)	**JUDGMENT IN A CIVIL CASE**
	)	92-0922-CV-W-9
v.	)	
	)	92-0819-CV-W-9
REIMER & KOGER ASSOCIATES, INC., *et al.*, *Defendants.*	)	

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

1) because there is no just reason for delay and for the reasons stated in the order dated June 3, 1996, judgment is entered in favor of I.I. Ozar, the Estate of Frank Morgan, Sherman Dreiseszun, Frank Sebree, Reimer & Koger Associates, Inc., Ron Reimer, Ken Koger, Clifford Shinski, Brent Messick, Robert Crew, and Shook Hardy and Bacon and against plaintiff on all claims asserted against these defendants in plaintiff's Amended Complaint;

2) defendants' request that the September 28, 1995, preliminary injunction be made permanent is granted;

3) KPERS is permanently enjoined from filing in any other court, claims arising out of KPERS' investments in Home Savings against the following defendants: Shook Hardy and Bacon; Frank Sebree; KPMG Peat Marwick; Robert W.L. Spence; Reimer & Koger

Associates, Inc.; Ronald Reimer; Kenneth Koger; Robert Crew; Clifford Shinski; Brent Messick; and Blackwell Sanders Matheny Weary & Lombardi; and

4) the $500 bond submitted to the Clerk of the Court by each defendant at the time of the preliminary injunction was entered shall be applicable to the permanent injunction.

Entered on July 22, 1996

R. F. Connor, Clerk

/s/ Tina Duer
(By) Deputy Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	)	
	)	92-0922-CV-W-9
v.	)	
	)	Filed July 25, 1996
REIMER & KOGER ASSOCIATES, INC., *et al.*, *Defendants and Third-Party Plaintiffs*	)	
v.	)	
RESOLUTION TRUST CORPORATION, *Third PartyDefendant.*	)	

ORDER GRANTING KPMG/PEAT MARWICK'S AND ROBERT W.L. SPENCE'S MOTION FOR SUMMARY JUDGMENT

On June 5, 1991, the Kansas Public Employees Retirement System (KPERS) brought this suit in Kansas state court against Reimer & Koger Associates, Inc. (Reimer & Koger), its principals, and several employees for claims arising out KPERS' investments in Home Savings Association of Kansas City, F.A. (Home Savings). In the same suit, KPERS also asserts claims against Michael Russell, the former Chairman of KPERS' Board of Trustees.

On December 23, 1991, KPERS amended its Complaint and asserted a claim against KPMG Peat Marwick (Peat Marwick) and Peat Marwick partner Robert W.L. Spence. Also on that date, KPERS

asserted claims against Frank Morgan, Sherman Dreiseszun, I.I. Ozar, other Home Savings directors (the HSA defendants), and Frank Sebree.

Thereafter, the HSA defendants filed third-party claims against the Resolution Trust Corporation (RTC).

On June 30, 1994, the third-party claims against the TRC were dismissed.

Peat Marwick and Robert W.L. Spence move for summary judgment asserting that on the undisputed facts of this case, KPERS' claim asserted against them is barred by the applicable statute of limitations.

A hearing was held on February 21 through February 23, 1996, where the parties presented oral arguments on Peat Marwick and Robert W.L. Spence's Motion for Summary Judgment on the statute of limitations issues.

I.
STANDARD FOR MOTION FOR SUMMARY JUDGMENT

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970; *Inland Oil and Transport Co. v. United States*, 600 F.2d 725, 727-28 (8th Cir.), *cert. denied*, 444 U.S. 991 (1979).

If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *Roberts v. Browning*, 610 F.2d 528, 531 (8th Cir. 1979); *United States v. Porter*, 581 F.2d 698, 703 (8th Cir. 1978). The summary judgment procedures is not a "disfavored procedural shortcut." Rather it is "an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986);

see also, City of Mt. Pleasant v. Associated Electric Corporative, Inc., 838 F.2d 268, 273 (8th Cir. 1988). Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trail about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 324.

The moving party bears the initial burden of demonstrating by reference to portions of pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, the *absence* of genuine issues of material fact. However, the moving party *is not required* to support its motion with affidavits or other similar materials *negating* the opponent's claim. *Id.* (emphasis added).

The nonmoving party is then required to go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* A party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in his pleading to get to a jury without any significant probative evidence tending to support the complaint. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986).

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The evidence favoring the nonmoving party must be more than "merely colorable." *Id.* at 2511. When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 106 S. Ct. 1348, 1356 (1986) (footnote omitted).

The inquiry to be made mirrors the standard for a directed verdict: whether the evidence presented by the party with the onus of proof is sufficient that a jury could properly proceed to return a verdict for that party. *Anderson v. Liberty Lobby*, 106 S.Ct. at 2511. Essentially, the question in ruling on a motion for summary judgment and on a motion for directed verdict is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 2512.

II.
UNDISPUTED FACTS

Based on the parties' pleadings, affidavits, deposition testimony, and admissions on file, the following facts are undisputed.

A. *Background Information*

Facts relating to KPERS' investment in Home Savings and to KPERS' knowledge of problems with that investment are set forth in a related order issued on June 3, 1996, and will not be repeated in this order.

B. *KPMG Peat Marwick's Audits of KPERS*

KPERS' fiscal year ends on June 30. KPERS' Board if required to publish yearly financial statements showing KPERS' financial status. K.S.A. § 74-4909(8). KPERS must also prepare an annual report, including KPERS' financial statements, that outlines KPERS' operations for each fiscal year. K.S.A. § 74-4907(2). KPERS' annual reports are sent to the governor and to each Kansas legislator.

Ron Bleidissel was KPERS' Chief Accountant from 1969 to 1991. Bleidissel, as KPERS' Chief Accountant, was primarily responsible for preparing KPERS' annual report. Hawn depo. At 61.

The Kansas Legislative Division of Post Audit (Post Audit) is part of the legislative branch of the Kansas government. *See* K.S.A. § 46-1103. Post Audit reports to the Legislative Post Audit Committee of the Kansas Legislature (the Committee) is made up of five senators and five members of the House of Representatives.

Post Audit is required by statute to perform "an annual audit of the accounts of [KPERS], which audit shall be filed as soon after the close of the fiscal year as practicable." K.S.A. § 74-4907a(3).

Post Audit contracted with Peat Marwick to perform financial audits of KPERS' year-end financial statements for each of the fiscal years 1983 to 1988. Randy Tongier, who has been the Financial Compliance Audit Manager of Post Audit since 1976, was peat Marwick's principal contact at Post Audit. Tongier depo. At 16. Tongier was responsible for supervising and reviewing Peat Marwick's work. Tongier depo. At 16.

Peat Marwick assigned audit teams to perform the 1983 through 1988 audits of KPERS' financial statement. Robert W. L. Spence served as the audit engagement partner for each of those audits.

The yearly contracts entered into between Post Audit and Peat Marwick set forth the scope of work to be performed by Peat Marwick and provided that he financial compliance audit of KPERS was to be performed n accordance with the United States General Accounting Office's "Standards for Audits of Governmental Organizations, Programs, Activities and Functions." *See* Contracts at Peat Marwick Exhs. 20, 21, 22.

An independent audit was obtained by the Kansas Legislature in order to ascertain whether KPERS' financial statements, taken as a whole, are in compliance with Generally Accepted Accounting Principles (GAAP). *See* Profumo Report at 7-8, Peat Marwick Exh. 4.

KPERS' knew that its management was responsible for fairly stating KPERS' financial position in its financial statements. Specifically, letters dated September 26, 1986, and October 4, 1988, from Crowther and Bleidissel to Peat Marwick stated: "[W]e acknowledge that we are responsible for the fair presentation in the financial statements of financial position in conformity with generally accepted accounting principles." See letters dated September 26, 1986, and October 4, 1988, Peat Marwick Exhs. 24 and 25.

In connection with the audit of KPERS' 1986 year-end financial statements, Peat Marwick issued an "Auditor's Report on Financial Statements." Peat Marwick Exh. 17. In its report, Peat Marwick stated that its examination was performed in accordance with Generally Accepted Auditing Standards (GAAS). Peat Marwick Exh. 17 at 242. Peat Marwick expressed an unqualified opinion about KPERS' 1986 year-end financial statements stating that "[i]n our opinion, the [KPERS'] financial statements present fairly the financial position for the year then ended." Peat Marwick Exh. 242.

In Auditor's Reports dated September 23, 1987, and October 4, 1988, peat Marwick rendered unqualified opinions on KPERS' 1987 and 1988 year-end financial statement.

As part of its audits of KPERS' 1986, 1987, and 1988 financial statements, Peat Marwick issued Audit Findings and Recommendations. KPERS received drafts of the 1986, 1987, and 1988 Audit Findings and Recommendations before the final audit

reports were issued. Specifically, Peat Marwick sent drafts of its Audit Findings and Recommendations to Ron Bleidissel, Marshall Crowther, and Randy Tongier. Bleidissel and Crowther reviewed each Finding and Recommendation and provided Peat Marwick with written Responses to each Finding and Recommendation. The Findings and Recommendations and KPERS' corresponding Responses were included in the Financial Compliance Audit Reports that were published and distributed each year. Peat Marwick Exhs. 17-19.

KPERS' accounting policy was to record its direct placement investments at cost, and the value of the investment was revised in KPERS' financial statements only if the investment was permanently impaired. See march 6, 1986, memo from Crowther to ken Koger, Peat Marwick Exh. 126; Richard Hrdlicka depo. At 188. Once it was determined that an investment was impaired, that investment was recorded at its market value.

Included in Peat Marwick's 1986 Auditor's Report was the following Audit Finding under the heading "Investment Accountability:"

> Generally accepted accounting principles require that investments be stated at the Lower of cost or market. Our analysis of investment fair market values indicates that additional procedures, to determine the fair market value, are warranted for certain of the System's investments to ensure investments are stated at the lower of cost or market. The System has established an investment fund whose investment objective is to supply venture capital to regional companies known as The Kansas Investment Fund. Performance evaluations and market analysis of these private, nontraditional placements would assist the system's management in properly accounting for permanent declines, if any, in the carrying values of these investments.

See KPERS' 1986 Financial and Compliance Audit Report, Peat Marwick Exh. 17 at 237.

After this Audit Finding, Peat Marwick made the following Recommendation:

> We recommend performance review of such investments be performed on a periodic basis. This review will help ensure that "lower of cost or market" accounting requirements which are necessary for fair financial statements presentation are met.

See KPERS' 1986 Financial and Compliance Audit Report, Peat Marwick Exh. 17 at 237.

In its Response to the Recommendation, KPERS concurred with this Audit Finding and with the Recommendation. Also, KPERS stated that it had implemented procedures to recognize poorly performing investments and to reflect "permanent investment value impairment" in its financial statements. Peat Marwick Exh. 17 at 237.

In connection with the 1987 audit, Peat Marwick made the following Finding under the heading "Investment Valuation:"

> Generally accepted accounting principles require that investments be stated at the lower of cost or market. Our analysis of the investments' fair market value indicates Partial impairment of several investments. These investments should be adjusted to reflect the impairment of market value below the investment cost.

See KPERS' 1987 Financial and Compliance Audit Report, Peat Marwick Exh. 18 at 337.

Peat Marwick made the following Recommendation:

> We recommend that an investment allowance account be established to protect against potential investment impairment, and that the account be analyzed on a monthly basis to assure that the allowance is stated correctly and that investments are properly reflected at lower of cost or market.

Pear Marwick Exh. 18 at 337.

In its Response to the Finding, KPERS concurred with Peat Marwick's Recommendation. Peat Marwick Exh. 18 at 337. However, during fiscal year 1988, KPERS did not establish an investment allowance account. Tongier depo. At 80-81.

During the 1988 audit, Peat Marwick determined that $19,215,721 of KPERS' direct placement investments were impaired although

KPERS had not reflected the impairment in its June 30, 1988, financial statements. Complaint, ¶ 242. An adjustment to the financial statement was not made part of the audit because Peat Marwick determined that the difference between the stated value of the investments as show in the financial statements and the value determined by Peat Marwick was immaterial. *See* Spence depo. At 176. However, in connection with the 1988 audit, Peat Marwick issued the same Finding under the heading "Investment Valuation" that it had in the 1987 audit. Again, Peat Marwick recommended "that an investment allowance account be established to protect against potential investment impairment, and that the account be analyzed on a monthly basis to assure that the allowance is sated correctly and that investments are properly reflected at lower of cost or market." Peat Marwick Exh. 19 at 460.

In KPERS' Response, KPERS stated that "[t]he determination of a fair market value and the determination of impairment has been the subject of discussion at several meetings of the Board of Trustees. The Trustees have requested their investment consultant to research the problem and recommend a model for implementation." Peat Marwick Exh. 19 at 460.

Spence shared with Bleidissel a list of the investments that Peat Marwick had determined were impaired. Spence depo. At 172-14 [sic]. Peat Marwick auditor John Carper also told Bleidissel after the 1988 audit that some of KPERS' direct placement investments were impaired. Carper depo. At 40-45. Furthermore, Tongier stated in his deposition that he remembered that peat Marwick had determined that there were impairments in the direct placement investments during the 1987 and 1988 audits. Tongier depo. at 30. Finally, Trustee Mont Draper II stated in his deposition that Peat Marwick had determined during the 12988 audit that approximately $19 million in direct placement investments were impaired. Draper depo. at 312.

In 1988, Post Audit engaged the accounting firm of Baird, Kurtz & Dobson (Baird Kurtz) to audit KPERS' financial statements for the fiscal year ending June 30, 1989.

In the fiscal year 1989 audit, Baird Kurtz noted in its audit workpapers that as of August 31, 1989, KPERS had not yet established an investment allowance account. Peat Marwick Exh. 47. During August 1989, Baird Kurtz auditor told Tongier at Post Audit that Baird Kurtz was discussing with KPERS whether KPERS should

record and allowance for investment losses for the fiscal year ended June 30, 1989. Tongier depo. At 99-100.

At a Legislative Post Audit Committee meeting on September 29, 1989, Crowther reported that KPERS had established in its June 30, 1989, financial statements an investment allowance account. *See* September 29, 1989, Minuted of the Legislative Post Audit Committee, Peat Marwick Exh. 34 at 1.

In KPERS' 1989 financial statements an investment allowance account appeared that reduced KPERS' outstanding balance of investments by $24,358, 631. Plaintiff's Supplemental Answers to peat Marwick's First Interrogatories to Plaintiff, Peat Marwick Exh. 51.

C. KPERS Claim Against Peat Marwick and Spence in Count XV

In Count XV of its Sixth Amended Complaint, KPERS alleges that Peat Marwick and Spence breached their duty to KPERS when they performed the audits of KPERS and issued opinions on KPERS' financial statements.

KPERS alleges that Peat Marwick erroneously represented to KPERS that KPERS' financial statements conformed with Generally Accepted Accounting Principles, for the fiscal years 1986 through 1988, because "the financial statements contained all investments at cost, when the market value of a significant portion of the direct placement investments was below cost." Complaint, ¶ 236. KPERS alleges that Peat Marwick's failure to disclose the true value of the direct placement investments caused KPERS' financial statements to be distorted. KPERS alleges that if it had bene told about the impaired investments it "would have been able to take the necessary action to stop the losses and eliminate additional monies being placed in impaired investments." Complaint, ¶ 244. Furthermore, KPERS alleges that it would have been able to ferret out the "wrongful acts" of the Home Savings defendants, Michael Russell, and the Reimer 7 Koger defendants. Complaint, ¶ 248.

KPERS next asserts that Peat Marwick breached its duty to KPERS because it failed to establish an investment allowance account to recognize impaired investments. Complaint, ¶ 242.

Finally, KPERS asserts that in violation of the audit contracts

entered into between Legislative Post Audit and peat Marwick, Peat Marwick destroyed the audit work papers relating to the KPERS' audits.

As a result of the above behavior, KPERS asserts it suffered a loss of over $100 million.

III.
LEGAL STANDARDS

On July 25, 1995, the Eighth Circuit Court of Appeals held that "the limitations law of the forum state, Missouri, must govern this case." *KPERS v. Reimer & Koger*, 61 F.3d 608, 614 (8th Cir. 1995). "Under Missouri law, KPERS' cause of action will be subject to the five-year Missouri limitation period for fraud, Mo. Rev. State. § 526.120(5)(1994), unless 'fully barred' by a shorter statute in the state where the cause originated, Kansas." *Id.* The Court of Appeals directed me to "apply the Kansas two- and three-year statutes to KPERS' claim if the claims would be 'fully barred' by these statutes." *Id.* at 615.

Missouri's "borrowing statute," Mo. Rev. Stat. § 516.190, provides: "Whenever a cause of action has bee fully barred by the laws of the state, territory, or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state."

Tort claims are subject to a two-year limitation period in Kansas under K.S.A. § 60-513(a)(4) and to a give-year limitation in Missouri under Mo. Rev. State. § 516.120(4).

Contract claims are subject to a five-year statute of limitations under Kansas law, K.S.A. § 60-512, and Missouri law, Mo. Rev. Stat. §516.120(1).

IV.
DISCUSSION

Peat Marwick and Spence argue that summary judgment should be granted in their favor because, on the undisputed facts on this record, KPERS' claim asserted against them in Count XV is a claim for professional negligence and is therefore barred by the Kansas two-year statute of limitations.

KPERS contends that under Kansas law, its claim against peat Marwick and Spence is not subject to any statute of limitations because the audit of KPERS was a governmental function, i.e., a government audit of a governmental agency. KPERS asserts that Peat Marwick's altering of its normal auditing procedures to conduct the KPERS' audit demonstrates that auditing a government agency is different than auditing a company in the private sector.

Under Kansas common law, limitations periods did not run against claims asserted by governmental entities performing governmental functions. *Stephen v. GAF Corp.*, 747 P.2d 1326 (Kan. 1987). K.S.A. § 60-521.

In orders issue din this case May 3, 1996, October 24, 1995, and June 3, 1996, I determined that KPERS was performing a proprietary function when it invested KPERS' funds. Peat Marwick's auditing of KPERS' investments is the basis for KPERS' claims against Peat Marwick in this case. The auditing of a proprietary function is a proprietary function. Therefore, KPERS' claims against Peat Marwick are subject to a statute of limitations under Kansas law.

KPERS next argues that under Missouri's common law, statutes of limitation did not apply to actions brought by the state. This concept was expressed by the maxim "No time runs against the Crown" ("Nullum tempus occurit regi"). *State v. Dalton*, 182 S.W.2d 311, 312 (Mo. 1944). The common law concept of 'Nullum tempus occurrit regi' has been abolished by statute in Missouri. Missouri Revised Statute § 516.360 provide that "[t]he limitations prescribed in section 516.010 to 516.360 shall apply to actions brought in the name of *this* state." (Emphasis added).

KPERS argues that § 516.360 abolished the common law only for suits brought by or on behalf of the State of Missouri and does not apply to states other than Missouri. Thus, the common law rule applies to prevent a statute of limitations from running on KPERS' claims against Peat Marwick and Spence.

However, the common law concept that "no time runs against the crown" did no apply to political subdivisions of a state. *Emery v. Holt County*, 132 S.W.2d 970, 971 (Mo. 1939). Because KPERS is a political subdivision of the State of Kansas, the common law rule never applied to claims asserted by KPERS. Therefore, KPERS' claims against Peat Marwick and Spence are subject to a statute of limitations under Missouri law.

Next, KPERS contends that the claim asserted against Peat Marwick and Spence sounds in contract and is therefore subject to a five-year statute of limitations. Peat Marwick and Spence respond that KPERS had originally asserted a claim for breach of contract against them but has not asserted that claim since it filed its Fourth Amended Complaint on June 30, 1994. Therefore, Peat Marwick and Spence argue that KPERS' claim asserted against them is one for professional negligence.

If the claim asserted in Count XV is for breach of contract, the Missouri five-year statute of limitations for actions involving written contracts applies. Mo. Rev. Stat. § 516.120(1). If KPERS' claim sounds in tort, the two-year Kansas of limitations applies. K.S.A. § 60-513(a)(4).

The difference between a tort and a contract claim is that a breach of contract is a failure to perform a duty arising out of or imposed by a contract, whereas a tort is a violation of a duty imposed by law. *Hunt v. KMG Main Hurdman*, 839 P.2d 45, 47 (Kan. Ct. App. 1992). When a claim includes elements of contract and tort, whether the claim sounds in tort or contract is determined by whether the contract calls for a "specific result." *Id.* at 48.

In Count XV, one of KPERS allegations is that Peat Marwick failed to maintain its audit workpapers as required by each of the contracts entered into between KPERS and Peat Marwick. Because failure to maintain the audit workpapers violates the contracts, Count XV has a contractual element to it.

However, in Count XV KPERS also alleges that Peat Marwick and Spence 1) violated the duty of care in performing the accounting and auditing functions because they failed to exercise due professional care in performing the examination and preparing the reports of KPERS; 2) failed to determine that there was a problem with the direct placement program; and 3) failed to establish an investment allowance account. These are allegations that Peat Marwick and Spence failed to perform duties imposed upon them by law.

Because KPERS' claim against Peat Marwick and Spence includes both elements of tort and contract, whether he claim sounds in tort or contract is determined by whether the audit contracts called for a "specific result." The audit contracts required Peat Marwick to perform an audit but did not require peat Marwick to obtain a specific result. *See Hunt*, 839 P.2d at 49 (plaintiff's claim sounded in tort when

defendant auditor's engagement letter required auditor to perform an audit but did not require a specific outcome). Therefore, because the claim sounds in tort rather than contract, I will apply the Kansas two-year statute of limitations. *See* K.S.A. § 60-513; *Brubaker v. Cavanaugh,* 542 F. Supp. 944, 947 (D. Kan. 1982).

Because a claim for professional negligence is subject to a shorter statute of limitations under Kansas law than Missouri's five-year statute of limitations, if KPERS' claims are fully barred under the shorter Kansas statute of limitations, Peat Marwick and Spence will have a complete defense to those claims in this case.

KPERS brought suit against Peat Marwick and Spence on December 23, 1991, and therefore KPERS' claim must have accrued after December 23, 1989, to avoid being fully barred by the Kansas two-year statute of limitations.

K.S.A. § 60-513(b) provides that he cause of action for tort claims "shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or if the fact of injury is not reasonably ascertainable until sometime after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party."

The "fact of injury" refers to the time when plaintiff knew or should have reasonably determined that plaintiff's damages have been caused by an act or omission of a defendant. *Penalosa Cooperative Exchange v. A.S. Polonyi Co.,* 754 F. Supp. 722, 735 (W.D. Mo. 1991); *Cowan v. Lederle Laboratories,* 604 F. Supp. 438, 442 (D. Kan. 1985). *See also Gilger v. Lee Construction, Inc.,* 820 P. 2d 390, 299 [sic] (Kan. 1991).

In order for the limitations period to begin running, the plaintiff does not need to know the full extent of the injury or the full value of the right to sue. *Brueck v. Krings,* 638 P.2d 904, 908 (Kan. 1982); *Bryson v. Wichita State University,* 880 P.2d 800, 803 (Kan. Ct. App. 1994); *Gilger,* 820 P. 2d at 400. Once plaintiff discovers, or reasonably should have discovered, facts on which to base a claim against a defendant, the statute of limitations is triggered. See *Pancake House v. Redmond,* 716 P.2d 575, 577 (Kan. 1986); *Alioto v. Marshall Field's & Co.,* 77 F.3d 934, 937 (7th Cir. 1996).

Under KPERS' theory, Peat Marwick's failure 1) to find and communicate to KPERS that KPERS' direct placement investments were impaired and 2) to establish an investment allowance account in

KPERS' financial statements caused KPERS to lose over $100 million.

Therefore, when KPERS discovered, or reasonably should have discovered the fact of injury, i.e., that its direct placement program investments were impaired or that it should establish an investment allowance account to protect against impairment, the statute of limitations was triggered. Once KPERS discovered either of these facts, Peat Marwick's identity as the defendant would automatically be apparent. In other words, the statute of limitations was triggered once KPERS knew or reasonably should have discovered either of those facts because at that time KPERS' knew the facts on which it could base a claim against Peat Marwick and Spence.

KPERS argues that its injury was not reasonably ascertainable until the Legislative Joint Committee investigation revealed in 1991 "negligence and malfeasances existing in the direct placement program." Suggestions in Opposition at 19. However for the reasons stated in the related order dated June 3, 1996, KPERS had actual knowledge or knowledge from which it could reasonably ascertain that one of its direct placement investments was impaired before December 23, 1989.

In addition, one of the findings in Peat Marwick's 1987 and 1988 Auditor's Reports was that some of KPERS' direct placement investments were partially impaired. Furthermore, in both of the Auditor's Reports for those years, Peat Marwick made a Recommendation that KPERS establish an investment allowance account to recognize impairment of direct placement investments. KPERS concurred with these findings and Recommendations in both 1987 and 1988 but failed to establish an investment allowance account.

Furthermore, Spence stated at his deposition that he discussed specific impaired investments with Bleidissel as part of the fiscal year 1988 audit. Before the Financial and Compliance Audit Reports were issued from 1988 and 1989, KPERS' Board was informed about peat Marwick's Audit Findings and Recommendations relating to the impairment of KPERS' direct placement investments. In its Response in the 1988 Financial and Compliance Audit Report, KPERS stated that there had been discussions in KPERS' Board meetings to determine how to adequately value impaired investments. In August 1989, Baird Kurtz noted in its workpapers that KPERS had not yet

established an investment allowance account as recommended by Peat Marwick. Around that same time, Baird Kurtz discussed with KPERS whether to record an allowance for investment losses for the fiscal year ended June 30, 1989.

Finally, by September 30, 1989, KPERS has established an investment allowance account in its June 39,[sic] 1989, year end financial statements in order to recognize existing impairments and to make allowances for future impairments in the direct placement program investments. Establishing the investment allowance account and writing off a portion of the direct placement investments in the 1989 financial statements demonstrates that KPERS knew or could reasonably have ascertained the fact of injury for its claim against peat Marwick and Spence by no later than September 29, 1989. Thus the two-year statute of limitations for the claim asserted in Count XV began to run by September 29,1 989. KPERS' professional negligence claim against peat Marwick and Spence was not filed until December 23, 1991, mor than two years after September 29, 1989. Therefore, that claim was fully barred by the Kansas statute of limitations when it was filed on December 23, 1991. Because KPERS' claim against Peat Marwick and Spence is fully barred by the Kansas statute of limitations, Peat Marwick and Spence have a complete defense against the claims in this case. *See* Mo. Rev. Stat. § 516.190. Therefore, Peat Marwick and Spence's Motion for Summary Judgment on Count XV will be granted.

Even if KPERS' injury was not reasonably ascertainable from facts actually known to KPERS, the knowledge of KPERS' agents is imputed to KPERS. For the reasons stated in the related June 3, 1993, order, the knowledge of the Reimer & Koger defendants is imputed to KPERS. See June 3, 1996, order at 48-51.

By August 1988, Reimer & Koger had actual knowledge that the Home Savings investment was impaired. In a memo dated August 30, 1988, Robbin Reynolds of Reimer & Koger wrote to Ken Koger that selling the Home Savings debentures would be a "tough sell." Sellers of private placement investments in the secondary market told Reynolds that because of Home Savings' risky portfolio, its low net worth, and its increasing substandard assets, selling the Home Savings debentures at a price agreeable to Reimer & Koger was not plausible. Specifically, one seller compared Home Savings with a similarly situated savings and loan whose debentures were selling for fifty cents

on the dollar. With this imputed knowledge, KPERS knew that its Home Savings investment was impaired by August 30, 1988. By that date KPERS knew or could have reasonable ascertained that it had the professional negligence claim against Peat Marwick and Spence it is now asserting. Accordingly, the statute of limitations based on KPERS' imputed knowledge from Reimer & Koger would have been triggered by at least August 30, 1988.

KPERS argues that because Peat Marwick concealed information about KPERS' financial status, the statute of limitations was tolled on its claims against Peat Marwick. Under Kansas law, in order "[t]o constitute concealment of a cause of action within the general rule tolling the statute of limitations on the ground the concealment must be fraudulent or intentional." *Friends University v. W.R. Grace,* 608 P.2d at 941. *See also City of Wichita, Kansas v. U.S. Gypsum Co.,* 72 F.3d 1491, 1499 (10th Cir. 1996). The party alleging concealment must "explain why due diligence did not lead or could not have led to discovery of the facts and the cause of action." *Friends University v. W.R. Grace,* 608 P.2d at 941.

No facts on this record could lead a reasonable finder of fact to conclude that Peat Marwick and Spence fraudulently or intentionally concealed information from KPERS. In fact, Peat Marwick shared the preliminary Audit Findings with KPERS and told KPERS that some of the direct placement investments were impaired. As a result of this knowledge, KPERS began in 1988 to determine how to accurately value impaired investments. Moreover, on this record, due diligence by KPERS would have easily led to the discovery before December 23, 1989, of the fact upon which it bases its claim against Peat Marwick and Spence. Therefore, KPERS has not demonstrated that concealment by Peat Marwick or Spence tolled the statute of limitations on KPERS' claims asserted against them.

V.
CONCLUSION

For the reasons stated, it is ORDERED that KPMG Peat Marwick and W.L. Spence's Motion for Summary Judgment based on the statute of limitations is granted.

/s/
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri

July 25, 1996.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	)	**JUDGMENT IN A CIVIL CASE**
	)	95-0819-CV-W-9
v.	)	
BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C., *et al.* INC., *et al.*, *Defendants.*	)	

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Blackwell, Sanders, Matheny, Weary & Lombardi's Motion for Summary Judgment based on the statute of limitations is granted. (June 3, 1996)

Entered on July 22, 1996

Filed, July 26, 1996

R. F. Connor, Clerk

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	)	
	)	92-0922-CV-W-9
v.	)	
	)	Filed Sep 09, 1996
REIMER & KOGER ASSOCIATES, INC., *et al.*, *Defendants and and Third-Party Plaintiffs,*	)	
v.	)	
RESOLUTION TRUST CORPORATION, *Third Party Defendant.*	)	

ORDER ENTERING JUDGMENT

KPMG Peat Marwick L.L.P. and Robert W. L. Spence's Motion for Summary Judgment was granted on July 25, 1996. Peat Marwick and Spence move for entry of final judgment under Rule 54(b), Federal Rules of Civil Procedure

Because there is no just reason for delay in entering final judgment on plaintiff's claims against Peat Marwick and Spence, judgment is entered in favor of KPMG Peat Marwick L.L.P and Robert W. L. Spence.

/s/
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri

September 9, 1996.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	)	**JUDGMENT IN A CIVIL CASE**
	)	92-0922-CV-W-9
v.	)	
REIMER & KOGER ASSOCIATES, INC., *et al.*, *Defendants.*	)	

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered in favor of KPMG Peat Marwick L.L.P. and Robert W.L. Spence.

Filed, September 9, 1996

R. F. Connor, Clerk

/s/ Tina Duer
(By) Deputy Clerk

Entered on Sep 09, 1996

(2)

No. 97-471

Supreme Court, U.S.
FILED
NOV 17 1997
CLERK

In The

Supreme Court of the United States

October Term, 1997

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI, L.C., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.L.P. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: November 14, 1997

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Respondent respectfully suggests that the issues framed by petitioner are more accurately stated as follows:

1. Whether the Court of Appeals properly concluded that petitioner's statute-of-limitations arguments are barred by the law-of-the-case doctrine when those arguments were rejected in an interlocutory appeal in 1995 and when this Court denied KPERS's petition for review of that decision in 1996.

2. Whether the Court should grant a petition for a writ of certiorari when, by the petitioner's own admission, the decision in this case will not affect any nonparties or have any precedential impact because the Kansas law on which the 1995 and 1997 decisions of the Court of Appeals are based has now been clarified by the state supreme court.

3. With respect to certain respondents, whether the Court should grant the petition, vacate the decision of the court of appeals, and remand for reconsideration in light of the Kansas Supreme Court statute-of-limitations decision when petitioner's claims against those respondents are still time-barred under the applicable Missouri statute of limitations.

PARTIES TO THE PROCEEDING

The named respondents to this case are: Reimer & Koger Associates, Inc., Ronald Reimer, Kenneth H. Koger, Clifford W. Shinski, Brent Messick, Robert Crew, Sherman Dreiseszun, I.I. Ozar, Frank Sebree, Peat, Marwick, Mitchell & Co., KPMG Peat Marwick, Robert Spence, Thomas S. Morgan, co-executor of the estate of Frank S. Morgan, Marilyn J., co-executor of the estate of Frank S. Morgan, Shook, Hardy & Bacon, through C. Patrick McLarney, substituted for Shook Hardy law firm, and Blackwell Sanders Matheny Weary & Lombardi, L.L.P.

RULE 29.6 STATEMENT

Respondent Blackwell Sanders Matheny Weary & Lombardi, L.L.P. is a Kansas City, Missouri-based law firm, with other offices outside of Missouri, operating as a limited liability partnership under the laws of the State of Missouri. Its member attorneys possess complete ownership of the firm, and the firm possesses no other ownership interests.

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STATEMENT OF THE CASE

Petitioner Kansas Public Employees Retirement System (KPERS) is the retirement plan for employees of the State of Kansas, including all Kansas state-court judges. KPERS claims that it lost a substantial amount of money in the 1980s on direct placement and other venture capital investments. In the 1990s, KPERS began to sue everyone involved with those unsuccessful investments, including the lawyers who prepared the transaction documents at the direction of KPERS's investment advisors. All of the lawsuits were filed in Kansas state courts. This case is the only case that was removed to federal court.

The underlying facts, though not directly relevant to the issues presented in the petition for certiorari, center on KPERS's 1986 investment in Home Savings Association, a federally insured savings and loan. Respondent Blackwell Sanders served as counsel to KPERS's investment advisors, Reimer & Koger Associates, Inc. (R&K), for purposes of the first Home Savings investment transaction from January to May 1986.[1] *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, 114 F.3d 679, 683 (8th Cir. 1997) (*KPERS V*) (Appendix A to KPERS's Petition, p. 1a). Blackwell Sanders prepared documents necessary to consummate the investment transaction but did not represent R&K or KPERS on a continuing basis. In December 1986, after the investment transaction was

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[1] Blackwell Sanders was only involved in the consummation of the initial $15 million investment in Home Savings that closed May 2, 1986. Blackwell Sanders played no role in KPERS's September 1986 investment of an additional $50 million in Home Savings.

completed, articles in the *Kansas City Star* raised questions regarding the wisdom of KPERS's investment in Home Savings and certain conflict of interest issues involving Michael Russell, KPERS's chairman. *Id.* In 1991, Home Savings failed for reasons unrelated to the work of Blackwell Sanders, and KPERS began this lawsuit. *Id.* at 684. Blackwell Sanders, however, was not sued until 1995 – almost nine years after its involvement in the initial Home Savings investment ended. *Id.* at 685.

During the summer of 1996, the District Court granted summary judgment in favor of all of the defendants in this case on the ground that the applicable statutes of limitation had run before KPERS filed its claims. *KPERS v. Reimer & Koger Assocs., Inc.*, Nos. 92-0922 & 95-0819, Order Granting Defendants' Motions for Summary Judgment (W.D. Mo. June 3, 1996) (Appendix D to Petition, p. 27a); *KPERS v. Reimer & Koger Assocs., Inc.*, Nos. 92-0922 & 95-0819, Order Granting Defendants' Motion for Final Judgment Pursuant to Rule 54 and Granting Defendants' Motion for Permanent Injunction (W.D. Mo. July 22, 1996) (Appendix E to Petition, p. 74a). That decision was affirmed by the Eighth Circuit in the decision KPERS now asks this Court to review.

The principal legal issues in this case, however, and the ones that KPERS now raises, were decided over two years ago in an interlocutory appeal in which this Court denied certiorari. The Eighth Circuit held in this earlier appeal that (1) when a case is removed, as this one was, under 12 U.S.C. § 1441a(*l*)(3), the limitations law of the forum – here, Missouri – applies; (2) under Missouri law, KPERS's claims are subject to Missouri's five-year statute of limitations unless "fully barred" by a shorter statute of

limitations in the state where the lawsuit originated; and (3) the applicable Kansas statutes of limitation[2] fully barred KPERS's claims because the special ten-year "KPERS" statute of limitations,[3] while applying "retroactively" to extend the limitations period for accrued but not yet barred claims, did not revive already barred claims. *KPERS v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608, 615 (8th Cir. 1995) (*KPERS III*). This Court denied KPERS's petition for a writ of certiorari in that earlier appeal. *KPERS v. Reimer & Koger Assocs., Inc.*, 116 S. Ct. 915 (1995).

Applying *KPERS III* on remand, the District Court concluded that KPERS's claims were barred by the two and three-year Kansas statutes of limitation and entered summary judgment in favor of all of the defendants. *KPERS v. Reimer & Koger Assocs., Inc.*, Nos. 92-0922 & 95-0819, Order Granting Defendants' Motions for Summary Judgment (W.D. Mo. June 3, 1996). KPERS's latest petition to this Court never challenges the District Court's application of *KPERS III* or its factual findings; rather, KPERS is now challenging the Eighth Circuit's

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[2] K.S.A. §§ 60-512, 513 (three years for statutory claims; two years for tort claims).

[3] Shortly after the defendants had filed their motions to dismiss in state court, the Kansas legislature adopted a ten-year statute of limitations applicable only to civil actions brought by KPERS. Kansas Laws 1992, ch. 321, § 21 (codified as K.S.A. § 60-522). After the defendants had argued that the new statute did not apply to claims already expired, the legislature amended the statute so that it would be "construed and applied retroactively." 1993 Kansas Session Laws ch. 227 (H.B. 2211) (codified as K.S.A. § 60-522(c)).

1995 *KPERS III* decision that the two and three-year statutes of limitation apply to KPERS's claims. KPERS argues that, under Kansas law, no statute of limitations applies to its claims because maintaining KPERS is a governmental rather than a proprietary function of the State of Kansas. In other words, KPERS is reasserting arguments that the Eighth Circuit rejected and this Court declined to consider when it denied KPERS's petition for a writ of certiorari after *KPERS III*.

After the District Court granted summary judgment in favor of all defendants, KPERS appealed,[4] and the Eighth Circuit affirmed.[5] *KPERS V*, 114 F.3d 679 (8th Cir.

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[4] In its opening brief before the Eighth Circuit in the present case, KPERS suggested for the first time that the statute-of-limitations issues be certified to the Kansas Supreme Court for decision. KPERS, however, never filed a motion to certify any questions to the state high court.

[5] KPERS alleges that the Eighth Circuit decided this appeal with "unusual haste," KPERS's Petition at 4, apparently because this case was set for argument in March 1997 after the calendar of arguments for that month had been issued, KPERS's Petition at 9. Although KPERS seems to imply that the setting of argument was motivated by improper considerations, a much more plausible explanation exists. As a matter of sound judicial administration, and in order to conserve judicial resources, related cases are generally assigned to the same panel that decided earlier appeals in the same case. The *KPERS* cases have all been decided by panels consisting of Judges Theodore McMillian (St. Louis), John R. Gibson (Kansas City), and either Pasco M. Bowman (Kansas City) or David R. Hansen (Cedar Rapids, Iowa). The court's annual Kansas City court session was scheduled for March 1997, and Judges McMillian, Bowman, and Gibson were already scheduled to sit in Kansas City that month. Moreover, many of the attorneys involved in this case are located in Kansas City. For the convenience of the court and the

1997). The court of appeals held that KPERS was prohibited by the law-of-the-case doctrine from relitigating the applicability of the two and three-year Kansas statutes of limitation even though the issue of whether KPERS's investment was a governmental rather than a proprietary function was not explicitly addressed in *KPERS III*. *Id.* at 687. The court addressed the merits of KPERS's governmental-function argument only to decide whether reliance on the law-of-the-case doctrine would result in a manifest injustice.[6] The court concluded that no manifest injustice would result from application of the doctrine because KPERS's arguments lacked merit. The court's conclusion was based in part on the Kansas Supreme Court's 1985 decision that " '[m]aintaining KPERS is a

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parties, therefore, the case was scheduled for argument in Kansas City in March 1997.

[6] KPERS states that the Eighth Circuit recognized "that it would be a 'manifest injustice' to" hold that the governmental-capacity issue cannot be relitigated under the law-of-the-case doctrine "if, in fact, KPERS' investment function [sic] were governmental." Petition at 6 n.8. Nothing in the Eighth Circuit's opinion supports this statement. The court of appeals stated that "[w]e are satisfied that the law of the case doctrine prevents KPERS from relitigating the issue of whether these statutes apply to its claims." *KPERS V*, 114 F.3d at 687. At the time of the decision in *KPERS III* – almost two years before the Kansas Supreme Court's decision in *KPERS v. Reimer & Koger* – the Eighth Circuit implicitly concluded that the Kansas Supreme Court would adhere to its holding in *In re Midland Industries*, 237 Kan. 867, 703 P.2d 840 (1985), that maintaining KPERS is a proprietary function of the state. That conclusion became the law of the case in 1995. Nothing in the *KPERS V* opinion suggests that the court would have changed its decision had the state supreme court overruled *Midland Industries* after *KPERS III* but before *KPERS V*.

proprietary function of the state.' " *Id.* (quoting *In re Midland Indus.*, 237 Kan. 867, 703 P.2d 840, 843 (1985)) (emphasis added). According to the court, the "clear holdings" of *Midland Industries* "compel rejection of KPERS's argument" that it is not subject to any statute of limitations because its investments were made in a governmental capacity. *KPERS V*, 114 F.3d at 688.

The Eighth Circuit issued its opinion in *KPERS V* on May 13, 1997, and denied KPERS's Petition for Rehearing and Suggestion for Rehearing En Banc on June 12, 1997. KPERS filed a second rehearing petition after the mandate issued, and the Eighth Circuit denied that petition as well.

Some of the same statute-of-limitations issues decided by the Eighth Circuit also arose in other KPERS cases pending in Kansas state courts, and a Kansas state trial court held that no statute of limitations applied to KPERS's claims because it was acting in a governmental capacity when it invested funds. *See KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 941 P.2d 1321, 1325-26 (1997). The defendants in five of the state-court cases sought interlocutory review of the trial court's decision. On June 27, 1997 – after the Eighth Circuit had already denied KPERS's petition for rehearing – the Kansas Supreme Court affirmed the trial court, holding that KPERS acts in a governmental capacity when it invests its funds. *Id.* at 1341-43. The court characterized its earlier contrary statement in *Midland Industries* as "pure dicta," *id.* at 1340, and stated that the Eighth Circuit's decision "regarding governmental-proprietary functions" was incorrect, *id.* at 1343. But the court also noted that the

Eighth Circuit had concluded that KPERS's governmental-function argument was barred under the law-of-the-case doctrine. *Id.* at 1338. Moreover, the Kansas court did not address the impact of the Missouri borrowing statute.

REPLY TO PETITIONER'S STATEMENT OF THE CASE

KPERS's statement of the case mischaracterizes the removal procedure used in this case, even though that procedure is irrelevant to the issues raised in KPERS's petition. Despite KPERS's suggestions to the contrary, this case was properly removed to federal court in Missouri. Although KPERS continues to complain that the respondents are attempting to avoid Kansas courts, the respondents and the Resolution Trust Corporation (RTC) have in fact exercised federal rights granted by Congress.

KPERS filed the petition that began this lawsuit on June 5, 1991, alleging that it lost $65 million in its 1986 investment in Home Savings Association, a Missouri-based savings and loan. Several defendants moved to dismiss KPERS's claims on the ground that the applicable statutes of limitation had run before KPERS filed its petition. The RTC, as receiver for Home Savings, then moved for leave to intervene in order to remove the case to federal court, but the state trial court[7] failed to rule on

[7] The state trial judge, the Honorable Franklin R. Theis, was subsequently removed from all of the KPERS cases because he "considered matters upon which no evidence had been presented" and made "derogatory" statements toward

that motion for over five months. *KPERS v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614, 616 (8th Cir. 1993) (*KPERS I*), *cert. denied*, 511 U.S. 1126 (1994). The state trial court nonetheless denied the motions to dismiss and held that no statute of limitations applied to KPERS's claims because KPERS was acting in a governmental capacity. *KPERS v. Reimer & Koger Assocs., Inc.*, No. 91-CV-786, Mem. Op. at 30-31 (Dist. Ct. Shawnee County, Kansas Aug. 21, 1992).

Several defendants then filed third-party petitions against the RTC, alleging that part of KPERS's alleged loss resulted from the RTC's negligent mismanagement of Home Savings and seeking indemnification from the RTC under 12 C.F.R. § 545.121. Invoking special authority granted to the RTC by Congress, the RTC removed the case to federal district court in Missouri under 12 U.S.C. § 1441a(*l*)(3)(A). While KPERS describes this "charitably . . . as a creative combination of third-party practice and a special removal statute," KPERS's Petition at 4, the Eighth Circuit concluded that the removal was proper and rejected KPERS's attempt to circumvent federal law.[8]

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defendants in a written order indicating "a personal bias against the defendants or the positions taken by them in this litigation." *KPERS v. Cohen, Brame & Smith, P.C.*, No. 92-CV-805, Mem. Decision at 9 (Dist. Ct. Shawnee County, Kansas Aug. 28, 1996) (Appendix to this Brief).

[8] After the RTC was brought into this lawsuit, KPERS sought and received an *ex parte* order from the state court that purported to sever the third-party claims against the RTC from the principal case. The sole basis for this order was to prevent the RTC from removing the entire case to federal court. The Eighth Circuit held that the severance order was void because it violated the Supremacy Clause. *KPERS I*, 4 F.3d at 616-17, 619.

KPERS I, 4 F.3d at 619-20. No issue regarding the removal of this case is before this Court at this time.

To the extent that any additional facts are relevant to the Court's consideration of this petition, respondent Blackwell Sanders Matheny Weary & Lombardi, L.C. incorporates by reference the factual statements in the opinions of the Eighth Circuit in *KPERS III* and *KPERS V*.

REASONS FOR DENYING THE WRIT

I. This Court Should Not Grant a Petition for a Writ of Certiorari When, by the Petitioner's Own Admission, the Decision in this Case Will Not Affect Any Nonparties or Have Any Precedential Impact Because the Kansas Law on Which the 1995 and 1997 Decisions of the Court of Appeals Are Based Has Now Been Clarified by the State Supreme Court.

This case does not present any issues worthy of certiorari. Petitioner admits that future litigants need no guidance on the narrow question of how Kansas courts interpret the special KPERS limitation statute because the state supreme court has now decided the issue. Petition at 2. The decision in this case will not affect anyone but the parties, and it will not have any precedential impact. There is no issue of federal constitutional law to decide. There is no split in authority between the circuits. And the vague federalism concerns advanced by petitioner are already fully addressed by the Court's well-developed decisions on federal-state comity and abstention.

To justify its petition for a writ of certiorari, KPERS offers only an ill-conceived argument in favor of a "proposed rule" of "cooperative judicial federalism." Petition at 12-13. KPERS states the rule as follows:

> Where a State is litigating its own claims under its own law in federal court, and where the litigation turns on a state-law issue of first impression, the federal court has an obligation to defer to the highest court of that State on that issue – perhaps in all cases, but *at least* where the federal court is informed that the issue is currently pending before the State's highest court. [Petition at 12 (emphasis in original).]

Under this rule, a federal court would be *required* to either *sua sponte* certify a controlling question of state law to that state's highest court or "simply wait" when there is "contemporaneous consideration of the issue by the highest court of that state." *Id.*

This Court need not grant certiorari in this case because federal law regarding abstention and certification is well developed and in no need of clarification. Moreover, the proposed rule would disrupt much of that well-developed law by abrogating the historic and considerable discretion federal courts have to certify issues of state law or to abstain from exercising their lawful jurisdiction. *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1721-22 (1996) (abstention); *Lehman Bros. v. Schein*, 416 U.S. 386 (1974) (certification). *Requiring* a federal court to "simply wait" would prejudice the other parties to the lawsuit, who are entitled to "the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. For example, by the time the Kansas Supreme Court

set aside its prior conclusion that maintaining KPERS is a proprietary function, some of the respondents had been litigating the applicable statute of limitations for more than *five years*.

Even if it were necessary to clarify the law in the areas of abstention or certification – and it is not – KPERS's proposed rule of "cooperative judicial federalism" would not help KPERS in this case. Under the proposed rule, the obligation to defer to a state's highest court arises only "where the litigation turns on a state-law issue of first impression." Petition at 2. The state-law issue decided by the Kansas Supreme Court was whether KPERS's investment activities were proprietary or governmental. While the state supreme court characterized some of its earlier decisions as dicta, the fact remains that the court had stated that "[m]aintaining KPERS is a proprietary function of the state." *Midland Indus.*, 703 P.2d at 843. While the Kansas Supreme Court is entitled to change its mind, it is misleading at best for KPERS to characterize the issue decided in the 1997 *KPERS* opinion as an issue of "first impression."[9]

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[9] KPERS's reliance on *Kaiser Steel Corporation v. W.S. Ranch Company*, 391 U.S. 593 (1968), and its reference to the Judicial Conference's endorsement of "procedures for submission of novel or difficult state law questions to the state courts," Petition at 16-17, are likewise irrelevant to this case. In 1995, when the Eighth Circuit decided *KPERS III*, the Kansas Supreme Court was on record as describing KPERS's functions as proprietary, *Midland Industries*, 703 P.2d at 843, and no pending case raised the issue. Thus the issue was not novel, difficult, or pending before the state supreme court when the Eighth Circuit decided it.

The proposed rule also fails to justify reversal of the Eighth Circuit's opinion because there was no "contemporaneous consideration of the issue" by the Kansas Supreme Court. As explained above, the Court of Appeals decided which statute of limitations applies to KPERS's claims in *KPERS III* – nearly two years before the issue was presented to the state supreme court. The court's subsequent application of the law-of-the-case doctrine, achieving the important goals of finality and conservation of judicial resources, was predictable and entirely proper.

In sum, none of the traditional grounds for granting a petition for a writ of certiorari are present in this case. At most, the Eighth Circuit incorrectly predicted the Kansas Supreme Court's change of course on the "governmental" versus "proprietary" distinction. But the Kansas Supreme Court's recent decision cannot have a dispositive impact on many of the summary judgments granted by the District Court, including the one in Blackwell Sanders' favor. Moreover, KPERS waived this issue by failing to appeal it in 1995 when it had the chance. Granting KPERS's petition for a writ of certiorari cannot be warranted by concerns for "cooperative judicial federalism" that are not even present in this case.

II. The Court Should Not Grant Certiorari Simply to Vacate and Remand Because the Court of Appeals Properly Concluded that Petitioner's Statute-of-Limitations Arguments are Barred by the Law-of-the-Case Doctrine Where Those Same Arguments Were Rejected in an Interlocutory Appeal in 1995, and This Court Denied Review of That Decision in 1996.

"[W]hen an issue is once litigated and decided, that should be the end of the matter." *United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 198 (1950). The Court of Appeals decided on July 27, 1995 that KPERS's claims in this case are subject to the two and three-year Kansas statutes of limitation for tort and statutory claims. *KPERS III*, 61 F.3d at 615. Nearly two years after *KPERS III*, with no intervening change in state law, the Court of Appeals adhered to its statute-of-limitations decision in *KPERS III* as the law of the case despite KPERS's new argument that it was not subject to *any* statute of limitations under Kansas law. *KPERS V*, 114 F.3d at 687. Under the law-of-the-case doctrine, the Eighth Circuit's decision in *KPERS V* was indisputably correct when it was rendered, and this Court should not grant KPERS's petition for review. By granting the petition, this Court would disturb the same 1995 ruling that this Court has already declined to review.

A. The Court of Appeals Properly Applied the Law-of-the-Case Doctrine

The law-of-the-case doctrine "promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.' " *Christianson v.*

Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988) (quoting 1B Moore et al., Moore's Federal Practice, p. 118 (1984)). Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation. *Messinger v. Anderson*, 225 U.S. 436, 444 (1912).

KPERS argues that this court should review the Eighth Circuit's decision because the Kansas Supreme Court's contrary decision came so soon after *KPERS V* was decided. But the issue so recently decided by the Kansas Supreme Court was first decided by the Eighth Circuit in 1995. KPERS asked this Court to review the *KPERS III* decision, but its petition was denied. *KPERS v. Reimer & Koger Assocs., Inc.*, 116 S. Ct. 915 (1996). In *KPERS III*, the Eighth Circuit held that KPERS's claims are subject to the Kansas statutes of limitation for tort and statutory claims rather than the ten-year KPERS statute of limitations. 61 F.3d at 615. In *KPERS V*, KPERS suggested that its claims were not subject to any statute of limitations at all.[10] 114 F.3d at 687. The Eighth Circuit simply and properly adhered to its *KPERS III* decision as the law of the case and concluded that KPERS's claims were still subject to the two and three-year Kansas statutes of limitation. *Id.*

KPERS contends that the law-of-the-case doctrine was not applicable to its new argument because it "elect[ed] not to seek interlocutory review with respect to

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[10] KPERS's new argument was based on its claim that its investment activities were governmental functions. While KPERS had made the governmental-function argument in the District Court before the *KPERS III* appeal, it did not raise the issue with the Court of Appeals in *KPERS III*.

the district court's ruling that KPERS' investment function is proprietary," thus preserving the right to argue on appeal after final judgment that its investment function was governmental and therefore not subject to any statute of limitations. Petition at 6, n.8. This argument, however, borders on frivolous. Courts do not decide arguments; they decide issues. Litigation of arguments that were not advanced on appeal are barred by the law-of-the-case doctrine if they could have been presented in the earlier appeal. When an appellate court decides that evidence is inadmissible, for example, the proponent of the evidence is not permitted to introduce the evidence under an alternative theory on remand. *United States v. Duchi*, 944 F.2d 391, 392-93 (8th Cir. 1991) (*cited in* Wright et al., 18 Federal Practice & Procedure § 4478 at p. 703 (Supp. 1997)). Similarly, the *issue* in *KPERS III* was whether the two and three-year Kansas statutes of limitation apply to KPERS's claims. KPERS should have raised any arguments against applying those statutes in its *KPERS III* briefs. The Eighth Circuit thus properly rejected KPERS's attempt in *KPERS V* to raise the governmental-function argument because KPERS failed to raise it in *KPERS III*.

B. No Manifest Injustice Results from Applying the Law-of-the-Case Doctrine

While "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice," *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983), nothing before the Eighth Circuit in *KPERS V* indicated that *KPERS III* was wrongly decided or that adherence to *KPERS III* would result in

any injustice. The only "manifest injustice" that exists in this case is the injustice of requiring the respondents to spend years litigating time-barred claims.

The Eighth Circuit's *KPERS III* decision on the applicable statute of limitations was not clearly erroneous when the court decided *KPERS V*, and thus the manifest-injustice exception to the law-of-the-case doctrine is inapplicable in this case. Far from being clearly erroneous, the *KPERS III* decision was entirely consistent with Kansas law as established by the Kansas Supreme Court when *KPERS V* was released.

KPERS's first argument against the applicability of the two and three-year statutes of limitation in *KPERS V* was that its investment activities were governmental rather than proprietary. But the Kansas Supreme Court had concluded that "[m]aintaining KPERS is a proprietary function of the state," *In re Midland Indus.*, 237 Kan. 867, 703 P.2d 840, 843 (1985), and that KPERS "should be held to the same responsibilities and liabilities" as a private business when it engages in activities ordinarily conducted in the private sector, *KPERS V*, 114 F.3d at 687 (citing *Shapiro v. KPERS*, 216 Kan. 353, 532 P.2d 1081, 1083-84 (1975)). In these circumstances, it is entirely reasonable to conclude – as did the Eighth Circuit – that KPERS engaged in a proprietary function when it invested its money in Home Savings.

Second, KPERS argued that the Missouri borrowing statute, Mo. Rev. Stat. § 516.190, does not apply to KPERS. According to KPERS, (1) statutes of limitation did not apply to actions by the state under the common law, (2) Missouri has abrogated the common law rule but only

with respect to lawsuits brought by the state of Missouri, and thus (3) Missouri statutes of limitation cannot run against KPERS because it is an instrumentality of the state of Kansas. The fundamental flaw in this argument is that the state of Kansas is not sovereign in Missouri, and thus the common law maxim *nullum tempus occurrit regi* never exempted Kansas from the running of Missouri statutes of limitation in the first place. The maxim means that "neither laches nor statutes of limitations will bar *the* sovereign." *Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 294 (1983) (O'Connor, J., dissenting) (emphasis added) (citing W. Holdsworth, 10 A History of English Law 354 (1938); D. Gibbons, A Treatise on the Law of Limitation and Prescription 62 (1835)). Kansas is not the sovereign in Missouri, and thus the maxim would not exempt it from the running of a Missouri statute of limitations in Missouri courts. *See, e.g., Pennhurst State Sch. v. Estate of Goodhartz*, 42 N.J. 266, 273, 200 A.2d 112, 116 (1964) ("When a foreign state sues in the courts of our State it lays aside its sovereignty and is to be dealt with as a private suitor."); *Michigan v. First Nat'l Bank of Arizona*, 17 Ariz. App. 45, 48, 495 P.2d 485, 489 (1972) ("once a state . . . seeks redress in the courts of a sister state, its mantle of sovereignty drops at its borders, and it enters the courts of another state clothed only in the common garb of an ordinary person"); *cf. Guaranty Trust Co. v. United States*, 304 U.S. 126, 133-34 (1938) ("limitation statutes of the forum run against a foreign government seeking a remedy afforded by the forum, as they run against private litigants").

Thus the *KPERS III* decision was not clearly erroneous but entirely correct, and the law-of-the-case doctrine barred KPERS's attempt to relitigate the statute-of-limitations issue in *KPERS V*.

III. With Respect to Blackwell Sanders and Several Other Respondents, This Court Should Not Grant the Petition, Vacate the Decision of the Court of Appeals, and Remand for Reconsideration in Light of the Kansas Supreme Court Decision Because Petitioner's Claims Against Them are Still Time-Barred Under the Applicable Missouri Statute of Limitations.

Even if the Kansas Supreme Court's 1997 decision on the governmental versus proprietary distinction were to be retroactively applied in this case, it would not change the outcome as to Blackwell Sanders and similarly situated defendants. This is a further reason to decline petitioner's invitation to grant certiorari, vacate and remand.

In *KPERS III*, the Court of Appeals concluded that (1) the limitations law of the forum – Missouri – governs this case, and (2) KPERS's claims are subject to a five-year statute of limitations, Mo. Rev. Stat § 516.120, unless those claims are "fully barred" by a statute in the state in which the cause of action arose – Kansas, *id.* § 516.190. *KPERS III*, 61 F.3d at 614. KPERS's Petition does not challenge the Eighth Circuit's decision regarding the applicability of the Missouri five-year statute of limitations or the District Court's finding that KPERS's claims against the respondents accrued on December 23, 1986. Thus any party KPERS failed to sue by December 23, 1991, is entitled to summary judgment even after the

Kansas Supreme Court's decision in *KPERS v. Reimer & Koger Associates, Inc.*, 262 Kan. 635, 941 P.2d 1321 (1997).[11]

With respect to KPERS's claims against Blackwell Sanders, the Kansas Supreme Court's decision does not change the result in this case: Blackwell Sanders is still entitled to summary judgment. The District Court found – and KPERS has not challenged the finding – that (1) the statute of limitations on KPERS's claims against Reimer & Koger Associates, Inc. began to run no later than December 23, 1986, (2) the statute of limitations on KPERS's claims against Blackwell Sanders began to run at the same time as the limitations period began for KPERS's claims against Reimer & Koger, and (3) KPERS did not bring its claims against Blackwell Sanders until January 6, 1995 – more than eight years after the limitations period began to run. *KPERS v. Reimer & Koger Assocs., Inc.*, Nos. 92-0922 & 95-0819, Order Granting Defendants' Motions for Summary Judgment at 51, 69-70 (W.D. Mo. June 3, 1996).

The applicability of the Missouri five-year statute of limitations is not addressed in the Kansas Supreme Court

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[11] KPERS inexplicably maintains that all of these issues would be subject to reconsideration if this Court remands the case for reconsideration in light of the Kansas Supreme Court decision. Its characterization of the Eighth Circuit's *KPERS III* rulings as "hypothetical," Petition at 21 n.27, is disingenuous. The issues were properly before the court, and KPERS did not then and has not now sought review of those decisions. KPERS should not be allowed to relitigate those issues. If this Court does remand the case, its instructions should clearly limit the scope of the remand to the issues presented in this petition for a writ of certiorari.

decision nor is it raised by KPERS's present certiorari petition. If this Court accepts KPERS's invitation to grant certiorari, vacate the opinion of the Court of Appeals, and remand the case for reconsideration, the District Court will be obligated by the law-of-the-case doctrine to enter summary judgment in favor of Blackwell Sanders and others on the basis of the five-year statute of limitations. Considering basic principles of fairness and justice, as well as the fact that KPERS has kept Blackwell Sanders in court for nearly three years on clearly time-barred claims, the case against Blackwell Sanders and similarly situated respondents should not be reopened. If the Court is inclined to remand this case, it should do so with clear instructions to again enter summary judgment in favor of Blackwell Sanders and similarly situated defendants because the Kansas Supreme Court decision does not affect the validity of the summary judgments entered in their favor.

CONCLUSION

For the reasons stated, KPERS's petition for a writ of certiorari should be denied. Alternatively, if this Court grants certiorari to allow the Eighth Circuit to reconsider its *KPERS III* opinion in light of the Kansas Supreme Court decision, it should do so only with respect to those respondents whose statute-of-limitations defenses are affected by the Kansas decision.

Respectfully submitted,

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Dated: November 14, 1997

APPENDIX

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, Plaintiff, vs. COHEN, BRAME & SMITH, Professional Corporation, ROGER C. COHEN, REIMER & KOGER ASSOCIATES, INC., KENNETH KOGER, EDWARD B. HART, BRENT MESSICK, and GAGE & TURNER, Defendants.	Case No. 92-CV-805
KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, A Corporate Instrumentality of the State of Kansas, Plaintiff, vs. CALLAN ASSOCIATES, INC., A California Corporation; RONALD D. PEYTON, an individual, REIMER & KOGER ASSOCIATES, INC., a Kansas Corporation; and KENNETH H. KOGER, an individual, Defendants.	Case No. 93-CV-375

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, a Corporate Instrumentality of the State of Kansas, Plaintiff, vs. MICHAEL K. RUSSELL, et al., Defendants.	Case No. 93-CV-389
KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, a Corporate Instrumentality of the State of Kansas, Plaintiff, vs. REIMER & KOGER ASSOCIATES, INC., a Kansas corporation; KENNETH H. KOGER, an individual; and BRENT A. MESSICK, an individual; Defendants.	Case No. 93-CV-588 K.S.A. Chapter 60
KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, a Corporate Instrumentality of the State of Kansas, Plaintiff, vs.	Case No. 93-CV-787

NORMAN ALLEN, REIMER & KOGER ASSOCIATES, INC., CHRISTOPHER DIEBEL, KENNETH H. KOGER, and LINDE THOMSON LANGWORTHY KOHN & VAN DYKE, P.C.,

Defendants.

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, a Corporate Instrumentality of the State of Kansas,

Plaintiff,

vs.

RICHARD BYRD, et al.,

Defendants.

Case No. 92-CV-923

MEMORANDUM DECISION

All of the captioned actions are brought by the Kansas Public Employees Retirement System (KPERS) against the respective defendants for the recovery of money. All of the cases were originally assigned to the Honorable Franklin R. Theis, Judge of the Seventh Division of this Court. Counsel for these respective defendants have now filed Motions for Change of Judge, together with Affidavits in support thereof which allege in substance that counsel have cause to believe and do believe that on account of the personal bias, prejudice, or interests of Judge Theis that the defendants cannot obtain a fair and impartial trial in these actions. These Affidavits have

been referred to the undersigned by the Administrative Judge for a decision in accordance with K.S.A. 20-311d. These Affidavits, while not entirely identical, concern essentially the same subject matter and, for the sake of brevity, will be discussed together. The Affidavits allege in substance:

"The first lawsuit in this series which was filed on June 5, 1991, entitled *KPERS v. Reimer & Koger Associates, Inc., et al.*, focused primarily upon KPERS' investment in Home Savings Association, a Kansas City based savings and loan. That suit was originally filed by KPERS in Shawnee County District Court and assigned to Judge Franklin R. Theis.

"After the commencement of the Home Savings suit, several additional defendants were added, including former directors and owners of Home Savings, commonly referred to as the Morgan defendants.

"Shortly thereafter, the Resolution Trust Corporation ("RTC") moved to intervene in the Home Savings action to ensure that the claims being asserted by KPERS against the Morgan defendants were not derivative claims which rightly belonged to the RTC as receiver of Home Savings. The RTC candidly disclosed repeatedly that if permitted to intervene it would remove the Home Savings action to federal court for the purpose of having its derivative claims dismissed.

"Despite the presentation of oral arguments, Judge Theis refused to rule upon the motion to intervene for a period exceeding five months.

"On October 2, 1992, the Morgan defendants filed a third party petition against the RTC seeking statutory indemnification and asserting claims of mismanagement against the RTC as receiver for Home Savings.

"Knowing the RTC's intention to remove the case to federal court once it became a party, KPERS filed a motion to sever the third party claim from the main action. The motion to sever was filed with Judge Theis in person late in the day on October 8, 1992. KPERS' counsel participated in an ex parte emergency hearing with Judge Theis after 5:00 p.m. KPERS' counsel later testified that absolutely no effort was made to contact any defense counsel to give them notice of the hearing or to seek their attendance, in person or by phone.

"Judge Theis did in fact grant KPERS' request for severance on the emergency grounds that should he not do so he would lose jurisdiction of the action when the RTC removed the case to federal court. . . .

"Five days later, the RTC removed the entire Home Savings case, including both the original action and the third party action, to the United States District Court for the Western District of Missouri, Western Division. The RTC took the position that the reported severance was unconstitutional and therefore null and void.

"The United States District Court judge assigned to the Home Savings case in Missouri, the Honorable D. Brook Bartlett, denied KPERS' request for remand, holding that the ex parte severance was null and void because it was done for the sole purpose of defeating federal court jurisdiction and thus violated the Supremacy Clause of the United States Constitution."

The comments of Judge Bartlett are included within the Affidavits.

Judge Bartlett's ruling was later upheld by the United States Court of Appeals for the Eighth Circuit.

The Affidavits next allege that in late 1995, a series of Motions were filed by KPERS and/or various defendants which sought summary judgment and/or judgment on the pleadings. By stipulation of the parties, these Motions all requested Judge Theis to rule upon pure legal issues, without reference to any underlying facts. The legal issues to be decided were:

(A) whether KPERS was subject to any statute of limitations because KPERS argued its claims arose from the performance of a governmental function;

(B) whether KPERS is subject to any statute of limitation because KPERS argued its claims were within the K.S.A. 60-521(2) exception applicable to claims asserted against former officers and employees of state agencies;

(C) if KPERS' claims were subject to a statute of limitations period, whether the special 10-year statute of limitations created for KPERS in K.S.A. 60-522 is applicable; and

(D) if KPERS' claims were subject to K.S.A. 60-522 was such specially created statute constitutional.

Appended to the Affidavits of counsel are the agreed Order of December 19, 1995 which established a briefing schedule concerning these Motions and Judge Theis' Memorandum Opinion and Entry of Judgment dated

April 3, 1996, which decided all of the Motions in favor of KPERS.

The respective Affidavits of counsel next assert that in Judge Theis' Opinion of April 3, 1996, he made numerous remarks which were critical of the defendants or their counsel, which were intemperate and injudicious and which reflect bias, prejudice or hostility toward the defendants. These remarks are set out at length in the respective Affidavits.

The Affidavits next allege that in his opinion of April 3, 1996, Judge Theis made numerous factual findings concerning these cases when no evidence had been presented and there was no record from which these findings could have been derived. The Affidavits set forth these respective findings with particularity and are referenced to the Opinion of April 3, 1996.

In *Holme v. Woleslagel*, 208 Kan. 385, 493 P.2d 541 (1972), the Supreme Court discussed at length the procedure to be followed by district courts when an Affidavit of Prejudice is filed against a trial judge. The Court also discussed the scope of review to be applied to the Affidavit of Prejudice. The Court concluded that the allegations of the Affidavit must be taken as true and the Affidavit must contain facts and reasons which give support for the belief that on account of the bias or prejudice of the judge, the affiant cannot obtain a fair trial. Previous adverse rulings, although numerous and erroneous, where they are subject to review, are not ordinarily alone sufficient to show such bias or prejudice as would disqualify the district judge. Bias or prejudice of the judge

toward an attorney may be a ground for statutory disqualification. In the later decision of *State v. Clothier*, 20 Kan. App. 2d 994, 894 P.2d 257 (1995), the Court of Appeals restated the pertinent rules in the Syllabus as follows:

> "JUDGES – Motion to Change Judge – Affidavit in Support of Motion – Review of Affidavit. In reviewing an affidavit filed pursuant to K.S.A. 20-311d, the reviewing judge passes only on the legal sufficiency of the document, not on the truth of the facts alleged. All facts set out in the affidavit are presumed to be true.
>
> "SAME – Motion to Change Judge – Affidavit in Support of Motion – Test for Determining Impartiality of Judge. The test for impartiality of a judge is what a reasonable person with knowledge of all the circumstances would believe based on the facts set out in the affidavit.
>
> "SAME – Motion to Change Judge – Affidavit in Support of Motion – Review of Affidavit – Duty of Reviewing Judge. The reviewing judge may consider information in addition to the affidavit, but only for the limited purpose of determining the affidavit's legal sufficiency. The reviewing judge must make a record of information considered which is not contained in the affidavit."

See also State v. Griffen, 241 Kan. 68, 734 P.2d 1089 (1987). At page 72, the Court states the determination to be made as follows:

> "Whether the charge of impartiality is grounded on facts that would create reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself, or even, necessarily in the mind of the litigant filing the motion, but rather

in the mind of a reasonable person with knowledge of all the circumstances."

In endeavoring to apply the above stated rules to the case at bar, only the respective Affidavits of counsel, together with the agreed Order of December 19, 1995 and Judge Theis' Memorandum Opinion and Entry of Judgment of April 6, 1996, which are appended to the Affidavits and incorporated therein have been considered.

While the allegations concerning Judge Theis' attempted severance of several defendants from what is referred to as the Home Savings case prior to its removal to the Federal Court do not pertain directly to these defendants in the present cases, these facts speak for themselves and are relevant to a consideration of whether, when viewed with all the allegations contained in the subject affidavits, Judge Theis has displayed a partiality toward KPERS and/or has formed preconceived opinions concerning the positions taken by these moving defendants in the companion litigation.

To detail and discuss each of the statements made by Judge Theis in his Opinion of April 6, 1996, of which counsel complain in their Affidavits would serve only to unnecessarily prolong this opinion. It suffices to say that some of the statements, standing alone, are defensible and are not necessarily indicative of a bias upon the part of the judge. However, when viewed in their entirety, these gratuitous statements indicate that the judge considered matters upon which no evidence had been presented and which were not included within a discovery record. Viewed as a whole, these statements are derogatory toward the defendants and may be said to indicate a

personal bias against the defendants or the positions taken by them in this litigation.

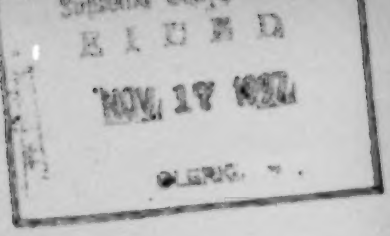
Considering all the facts in the respective Affidavits to be true, it appears that they would create reasonable doubt concerning the judge's impartiality in these cases in the mind of a reasonable person with knowledge of all the circumstances.

For the foregoing reasons, the respective Motions for Change of Judge in the above entitled actions are sustained. The Administrative Judge is requested to assign these cases to another judge of this district.

Dated: 28th day of August, 1996.

/s/ _____
FRED S. JACKSON
DISTRICT JUDGE

(3)



No. 97-471

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Petitioner,

v.

BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI, L.C., A LAW PARTNERSHIP, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENT SHOOK, HARDY & BACON

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35 pp

QUESTIONS PRESENTED

1. Whether the Court should grant review to establish a bright-line rule mandating use of state certification procedures or a stay of federal proceedings in order to further the principles of "cooperative judicial federalism" even though no such principles are implicated in this case, and neither the traditional criteria for certification or a stay, nor the elements of the proposed new mandatory rule, would be met.

2. Whether the Court should grant certiorari, vacate the judgment below, and remand to the court of appeals for reconsideration of its decision in light of a recent Kansas Supreme Court decision which would not alter the outcome of the case and which the court of appeals has already had the opportunity to consider.

LIST OF PARTIES AND RULE 29.6 STATEMENT

In addition to the parties listed by the petitioner, the Resolution Trust Corporation was a third-party defendant in the district court, as well as a limited intervenor in that court.

Shook, Hardy & Bacon has no parent companies or subsidiaries. Shook, Hardy & Bacon L.L.P. is the successor to Shook, Hardy & Bacon. Shook, Hardy & Bacon P.C. owns Shook, Hardy & Bacon International P.C. Shook, Hardy & Bacon International P.C. owns Administrative Services S.r.l. Shook Hardy and Bacon L.L.P. owns SHB Registered Agent, Inc., a Missouri corporation and SHB Kansas Registered Agent, Inc., a Kansas corporation. Certain partners of Shook, Hardy & Bacon L.L.P. are also partners in Shook, Hardy & Bacon, a multinational partnership.

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No. 97-471

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Petitioner,

v.

BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI, L.C., A LAW PARTNERSHIP, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENT SHOOK, HARDY & BACON

COUNTERSTATEMENT OF THE CASE

Petitioner Kansas Public Employees Retirement System ("KPERS"), as administrator of the pension fund for state and other public employees in Kansas, sued various investment advisors, accountants, lawyers, and others for damages arising from its investment of pension fund monies in a Missouri savings and loan that later failed. In its fourth petition for certiorari in this case, KPERS now seeks review of the Eighth Circuit's affirmance of the final judgment of the District Court for the Western District of Missouri dismissing KPERS' claims against respondent Shook, Hardy & Bacon ("Shook Hardy") and the other defendants as time-

barred under the two-year Kansas statutes of limitations for torts, made applicable to the claims by the Missouri borrowing statute.

KPERS' petition argues that the Eighth Circuit violated principles of "cooperative judicial federalism" by declining either to certify to the Kansas Supreme Court the question of whether KPERS' claims were immune from any statute of limitations at all under Kansas law or to stay federal proceedings while this issue was addressed by the Kansas Supreme Court in other litigation. Pet. at 12. Alternatively, KPERS complains that, following the Kansas Supreme Court's decision in that other litigation,[1] the Eighth Circuit should have granted KPERS' second petition for rehearing out of time in order to reconsider its ruling in light of that decision.

KPERS' contentions about "cooperative judicial federalism," as well as its specific procedural complaints against the Eighth Circuit, all rest on the erroneous premise that the timeliness of KPERS' claims in this case is governed by Kansas limitations law, rather than by *Missouri* law as the Eighth Circuit held in an interlocutory appeal not challenged in this petition. *See KPERS v. Reimer & Koger Assocs., Inc. ("KPERS III")*, 61 F.3d 608 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 915 (1996). Under the Missouri borrowing statute, Kansas limitations periods apply only if KPERS' claims would be fully barred under the Kansas statute, *id.* at 614; otherwise, the claims are subject to the five-year Missouri statute of limitations.

Although the parties fully briefed the timeliness of KPERS' claims under both the two-year Kansas statute and the five-year Missouri statute, the district court based its

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[1] *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321 (Kan. 1997).

dismissal of the claims on KPERS' failure to bring its claims within the two-year Kansas limitations period. The district court also found, however, that on the undisputed facts, KPERS' claims arose more than five years before it filed suit against Shook Hardy and other defendants. As the defendants argued on appeal, the district court's dismissal of the claims as time-barred was therefore correct under applicable Missouri limitations law even if, for whatever reason, the claims were not also barred under the Kansas statute.

KPERS' petition virtually ignores the critical issue of which state's limitations law actually applies to its claims in this case. Although KPERS acknowledges in two passing footnote references that Missouri, not Kansas, law governs, Pet. at 6 n.8, 21 n.27, it represents in the text that "the outcome of the litigation hinges on an issue of the proper interpretation of [Kansas] law." Pet. at (i). KPERS also suggests, misleadingly, that the "outcome-determinative issue" is whether KPERS' claims are immune from any statute of limitations at all because they arose from "governmental" rather than "proprietary" activities for the purposes of Kansas limitations law. Pet. at 8-9.

KPERS' complaint about the Eighth Circuit's failure to defer to the Kansas Supreme Court on what it calls an "outcome-determinative issue" of Kansas limitations law, *id.* at 8, is wrong on two counts.[2] First, as the defendants argued to the Eighth Circuit in opposition to KPERS' second petition for rehearing, even if the claims are not barred by the Kansas statute of limitations, they are still barred by the

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[2] KPERS' description of the governmental/proprietary issue as a "issue[] of first impression" under Kansas law, *id.* at 8, is inconsistent with the Kansas Supreme Court's statement that the Eighth Circuit had simply misapplied existing precedent when it rejected KPERS' position on that issue. *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d at 1338-41.

Missouri statute — the outcome is the same either way. Second, the so-called outcome-determinative Kansas law issue to which KPERS addresses its policy arguments — whether KPERS' investment of pension fund monies is a governmental or proprietary activity for Kansas limitations purposes — is essentially an academic question of historical interest only given the Kansas Supreme Court's recent ruling that KPERS' claims are subject retroactively to the special KPERS ten-year statute of limitations enacted by the Kansas legislature in 1992.[3] KPERS' petition simply misrepresents the Kansas Supreme Court's holding as resting on the governmental/proprietary issue. *See* Pet. at 7.[4]

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[3] *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d at 1346-47.

[4] The petition claims that the common issue in the various interlocutory appeals decided in the recent Kansas Supreme Court decision was "whether KPERS must satisfy the general statute-of-limitations periods applicable to claims brought by private parties." Pet. at 2. It then represents that the Supreme Court's "controlling answer" was that "general limitations periods *do not* apply because KPERS' investment function is 'governmental' rather than 'proprietary' in nature." *Id.* (emphasis in original). In fact, under the Supreme Court's decision, the governmental/proprietary distinction is irrelevant to KPERS' claims because those claims are subject to the special ten-year statute of limitations for KPERS, under which the claims were timely filed. *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d at 1346-47.

The only way in which the governmental/proprietary issue figured into the Kansas Supreme Court's decision was to eliminate the need for serious consideration of the defendants' federal and state constitutional arguments against the retroactive application of the new ten-year statute to claims that had already expired. *Id.* According to the Kansas Supreme Court, because KPERS' investment claims were previously immune from any statute of limitations as arising from a governmental activity, the defendants cannot possibly have any constitutional complaint against application of the new ten-year statute to such claims. *Id.*

For all of these reasons, even if the Eighth Circuit had done what KPERS asked and had either certified the Kansas law issues to the Kansas Supreme Court or granted KPERS' second petition for rehearing in order to consider the Kansas Supreme Court's intervening decision, the outcome would have been exactly the same. Assuming that KPERS' claims would not have been barred by the new ten-year Kansas statute of limitations, the Eighth Circuit would have applied Missouri's five-year statute and affirmed the district court's dismissal of KPERS' claims as time-barred under that statute. Indeed, the parties have already briefed their respective positions on the impact of the intervening Kansas Supreme Court decision in connection with KPERS' second rehearing petition, and the Eighth Circuit has declined to rehear KPERS' appeal in light of that decision.

This plainly is not a suitable case — on the merits — in which to "further define the architecture of our system of cooperative judicial federalism," Pet. at 3, or to employ the Court's "GVR" procedure.

1. Procedural History

KPERS' ceaseless machinations to avoid or thwart the proper exercise of federal jurisdiction over its claims have produced a long and complicated procedural history which would, in itself, make this case a poor vehicle for resolution of any of the issues KPERS raises in its petition.

a. The Parties and the Claims Asserted

In 1991, KPERS filed suit in Kansas state court against the former directors of Home Savings Association, F.A. of Kansas City, Missouri ("Home Savings") and others seeking damages for losses on investments it made in Home Savings in 1986. Among the director defendants was a partner in the Kansas City law firm of Shook, Hardy & Bacon, which represented Home Savings in connection with KPERS'

investments in the thrift. The law firm was added as a defendant in 1994.

The claims asserted by KPERS are "conventional" common law or statutory tort claims seeking money damages only. *See KPERS v. Reimer & Koger Assocs., Inc. ("KPERS II")*, 60 F.3d 1304, 1306 (8th Cir. 1995); *KPERS v. Reimer & Koger Assocs., Inc. ("KPERS IV")*, 77 F.3d 1063, 1071 (8th Cir.), *cert. denied*, 117 S. Ct. 359 (1996). KPERS' claims are being pursued by private counsel under a contingency fee agreement with KPERS.

On March 17, 1992, the Home Savings director defendants moved to dismiss KPERS' claims in lieu of answering KPERS' complaint. On May 14, 1992, the Resolution Trust Corporation ("RTC") as successor-in-interest to Home Savings moved to intervene in the case to prevent KPERS from pursuing derivative claims owned by the RTC. While the RTC's motion to intervene was pending, the state court denied the Home Savings directors' motion to dismiss KPERS' petition. The Home Savings directors then filed an answer which included a third-party petition naming the RTC as a third-party defendant in the case.

b. KPERS' Attempted Ex Parte Severance of the RTC Claims and Its Motions for Remand

KPERS responded to the RTC's joinder by filing an "emergency" motion which, by KPERS' own admission, was intended solely to prevent the RTC from exercising its right to remove the case to federal court under the RTC removal statute, 12 U.S.C. § 1441a(*l*)(3)(A). *See KPERS v. Reimer & Koger Assocs., Inc. ("KPERS I")*, 4 F.3d 614, 617 (8th Cir. 1993), *cert. denied*, 511 U.S. 1126 (1994). The Kansas state trial judge granted KPERS' motion to sever the claims against the RTC in an *ex parte* hearing held without notice

to any opposing counsel. *Id.* at 616-19.[5] Notwithstanding the severance order, the RTC proceeded to exercise its statutory right to remove the case to federal court in Kansas City, Missouri, the location of Home Savings, on October 13, 1992.

KPERS sought remand of its claims to Kansas state court on three occasions. KPERS initially argued that because the third-party claims against the RTC had been severed, only those claims had been removed to federal court. In an order affirmed by the Eighth Circuit, the district court denied the remand motion, holding that because the state court's *ex parte* severance of the third-party claims was "for the sole purpose of defeating a congressionally conferred right," it violated the Supremacy Clause and was therefore void. *Id.* at 617; *see also id.* at 619 (sole purpose of the severance was to "keep the original action in state court by preventing the RTC from exercising its federal right to remove").

The RTC was subsequently dismissed as a third-party defendant. A renewed motion to remand was again denied by the district court, based in part on the extraordinary actions taken by the state court to interfere with the RTC's statutory removal right,[6] as well as the facts that significant

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[5] KPERS notified the court clerk that it wished to file the motion to sever at approximately 4:00 p.m. and was informed by the clerk that the court would stay open past its 5:00 p.m. closing time to permit filing of KPERS' motion. *Id.* KPERS then appeared *ex parte* before the Kansas trial judge, who granted the motion to sever at 5:26 p.m. without notice to opposing counsel. *Id.*

[6] The Kansas state judge who ordered the *ex parte* severance was ultimately disqualified from presiding over any KPERS failed investment litigation for actual bias against the defendants as evidenced, among other ways, by his remarks in the same summary judgment order that was affirmed by the recent Kansas Supreme Court decision on which KPERS now relies in this case.

federal judicial resources had already been invested in the case and that the RTC would likely seek to intervene again following any remand, resulting in the case returning to federal court. KPERS did not seek interlocutory review of that decision.

c. The District Court's First Ruling that KPERS Is Subject to a Statute of Limitations

On October 22, 1993, the Home Savings director defendants filed a motion for summary judgment on their statute of limitations defense. KPERS opposed the motion on the ground that its claims arose from a governmental function and thus were exempt from any statute of limitations under the Kansas doctrine of *nullum tempus occurrit regi*. *See* K.S.A. § 60-521. Alternatively, KPERS argued that if its claims were subject to a statute of limitations, it was K.S.A. § 60-522, the ten-year statute of limitations enacted in 1992 for claims asserted by KPERS.[7] KPERS did not ask the district court to certify either of these issues of Kansas state law to the Kansas Supreme Court.

The Home Savings directors' motion for summary judgment was denied in part and granted in part. First, the district court rejected their argument that Missouri, rather than Kansas, limitations law governed KPERS' claims. Second, the district court rejected KPERS' argument that its investment activity was a governmental function and held, on the contrary, that KPERS' claims arose from proprietary

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[7] The Kansas legislature enacted the ten-year statute in response to a motion by the Home Savings director defendants, while still in state court, to dismiss KPERS' claims as time-barred under the general Kansas two-and three-year statutes of limitations applicable to tort claims. *KPERS III*, 61 F.3d at 609. When the Home Savings directors later argued that the new statute did not revive claims that were already time-barred, the legislature amended the statute to provide that it would apply retroactively. *Id.*

activity and thus were subject to statutes of limitations pursuant to K.S.A. § 60-521. Third, the court ruled in KPERS' favor on the applicable limitations period, holding that K.S.A. § 60-522 applied retroactively to revive even time-barred claims and that its ten-year limitations period governed KPERS' claims. *See KPERS III*, 61 F.3d at 610-11.

d. The *KPERS III* Holding that KPERS' Claims Are Governed By Missouri's Limitations Law and Borrowing Statute

The district court certified its ruling for interlocutory appeal, and the Home Savings directors appealed from the holdings adverse to them — that KPERS' claims are subject to Kansas limitations law and that they were retroactively revived by K.S.A. § 60-522. KPERS, for its part, chose not to cross-appeal from the district court's ruling that KPERS' claims are subject to applicable statutes of limitations because they arose from proprietary, rather than governmental, activity, nor did it request certification of this issue to the Kansas Supreme Court.

While the interlocutory statute of limitations appeal was pending, the case proceeded through fact discovery, and a trial date was set for January 1996. On July 27, 1995, the Eighth Circuit issued its decision reversing the district court's denial of the defendants' summary judgment motions. *KPERS III*, 61 F.3d at 608. The Eighth Circuit, applying federal choice of law principles made applicable by the RTC's removal under 12 U.S.C. § 1441a(*l*), held that KPERS' claims are governed by the statute of limitations of the forum state, Missouri. It further held that under the Missouri borrowing statute, KPERS' claims are subject to Missouri's five-year statute of limitations unless fully barred by a shorter statute in the state where the cause originated, Kansas. Finally, the Eighth Circuit held that in Kansas,

KPERS' claims would be subject to the general two- and three-year statutes of limitations applicable to common law and statutory tort claims because the newly-enacted special ten-year statute of limitations for KPERS did not revive claims that were already time-barred. Because the Kansas limitations periods were shorter than the Missouri five-year statute, the Eighth Circuit remanded the case to the district court to determine if KPERS' claims were barred under the Kansas two- and three-year statutes. *KPERS III*, 61 F.3d at 614-15.

In a petition for rehearing, KPERS requested that the Eighth Circuit certify to the Kansas Supreme Court the question of whether the Kansas legislature intended "to apply [the new ten-year statute] to KPERS' actions that would otherwise be barred by the running of a shorter statute of limitations." Again, KPERS did not request certification of whether KPERS performs a proprietary or governmental function for statute of limitations purposes. When the Eighth Circuit denied rehearing, KPERS filed a petition for certiorari raising only the retroactivity and federal choice of law issues, which was denied on February 20, 1996.

e. KPERS' Efforts To Evade the *KPERS III* Ruling and To Disrupt the Progress of the Case

On September 29, 1995, Shook Hardy and other defendants filed summary judgment motions on their statute of limitations defenses in light of *KPERS III*. KPERS' response to *KPERS III* was a series of maneuvers which the district court and Eighth Circuit found were intended to delay the progress of the case in federal court.

On August 23, 1995, KPERS filed duplicative lawsuits in Kansas state court on its Home Savings claims against Shook Hardy and other defendants in an effort to circumvent the RTC removal statute and obtain a more favorable ruling on

the statute of limitations issues. *See KPERS IV*, 77 F.3d 1063 (affirming district court injunction against KPERS initiating any additional duplicative suits in state court based on the Home Savings investments).

On September 12, 1995, KPERS filed a third ("second renewed") motion to remand this case to state court and, at the same time, a motion for reconsideration and certification of the governmental-proprietary issue. In its order denying KPERS' motion for reconsideration, the district court described it as another "one of KPERS' attempts to avoid the impact" of *KPERS III*, raising no new issues, and noted KPERS' earlier tactical decision not to present the governmental-proprietary issue to the Eighth Circuit when it had the opportunity in the *KPERS III* appeal.[8] As to KPERS' request for certification, the district court concluded that the procedure was not available because there was no lack of controlling precedent under the existing Kansas cases, which clearly established that KPERS' investments of pension fund monies were a proprietary, not a governmental, activity.[9]

While KPERS' motions for remand and reconsideration were pending, KPERS also moved to disqualify District Judge D. Brook Bartlett. The Eighth Circuit concluded that this too was "part of a strategic and tactical plan to delay and prevent the district judge from ruling on the pending summary judgment motions" following the *KPERS III* decision. *In re KPERS ("KPERS V")*, 85 F.3d 1353, 1359-61 (8th Cir. 1996) (denying KPERS' petition for writ of mandamus to compel recusal).

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[8] *See KPERS v. Reimer & Koger Assocs., Inc.*, No. 92 CV 922, Order (W.D. Mo. Oct. 25, 1995).

[9] *Id.*

f. The District Court's Holding That KPERS' Claims Accrued More Than Five Years Before They Were Filed and Are Time-Barred

Once KPERS' tactical motions were resolved, the district court turned to the motions for summary judgment filed by the defendants pursuant to the Eighth Circuit's *KPERS III* decision. Based on the parties' voluminous summary judgment submissions and three days of oral argument, the district court determined that, on the undisputed facts, KPERS' claims had all accrued by no later than December 1986, more than five years before KPERS sued Shook Hardy and other defendants.[10] The district court also held, once again, that KPERS' claims were not immune from statutes of limitations as arising from "governmental" activities. The district court accordingly granted the defendants' summary judgment motions, dismissed all of KPERS' claims as time-barred, and entered final judgment pursuant to Fed. R. Civ. P. 54.

On appeal from the final judgment of dismissal, KPERS made its first request to the Eighth Circuit to certify the governmental-proprietary issue to the Kansas Supreme

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[10] *See KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C. ("KPERS VI")*, 114 F.3d 679, 691 (8th Cir. 1997) (Petitioner's Appendix A ("App.") at 21a) ("district court held that the statute began to run in December 1986"), *petition for cert. filed*, 66 U.S.L.W. 3203 (U.S. Sept. 10, 1997) (No. 97-471). Among other undisputed facts supporting the district court's conclusion, the Eighth Circuit cited both press reports and memoranda sent directly to KPERS' executive secretary that established notice to KPERS of both the alleged conflicts of interest of KPERS' chairman, including his loans from banks related to Home Savings' owners, and Home Savings' failure to use the investment funds for the specific purpose presented to KPERS' board when it approved the investment. *See* App. at 16a-21a.

Court. In its May 13, 1997 decision affirming the district court, the Eighth Circuit held that the issue of whether KPERS was immune from any statute of limitations had been implicitly decided in *KPERS III* and was law of the case.[11] The Eighth Circuit then considered the summary judgment record and affirmed the district court's ruling that because the statute of limitations on KPERS' claims had begun to run by December 1986, the claims were time-barred under the two- and three-year Kansas statutes of limitations and thus under the Missouri borrowing statute.

KPERS' petition for rehearing and for rehearing *en banc* was denied by the Eighth Circuit on June 12, 1997. On June 20, 1997, the Eighth Circuit issued its mandate to the district court.

g. The Kansas Supreme Court's Recent Decision

After the Eighth Circuit had issued its mandate, the Kansas Supreme Court issued its decision on the statute of limitations issues in several KPERS failed investment cases pending in state court. *See KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321 (Kan. 1997). The Kansas Supreme Court disagreed with the Eighth Circuit's *KPERS III* decision concerning the specific Kansas limitations period applicable to KPERS, holding that KPERS' claims are subject to the special KPERS ten-year statute of limitations enacted in 1992, and not the two-and three-year statutes applicable to all other tort and statutory claims.

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[11] *See KPERS VI*, App. at 14a-15a & n.11. The Eighth Circuit discussed the merits of KPERS' governmental-proprietary arguments in *KPERS VI* only to explain why its implicit holding in *KPERS III* would have been the same even if it had expressly addressed the issue in that opinion, and therefore it was not manifestly unjust to treat the decision as the law of the case. *See id.* at 13a-14a.

KPERS then filed a second petition for rehearing requesting the Eighth Circuit to vacate its judgment in *KPERS VI* and recall its mandate to apply the Kansas Supreme Court's decision.[12] The defendants opposed the motion on the ground that application of the Kansas Supreme Court's decision on the Kansas limitations law issues would affect only the reasoning, not the result, in the Home Savings case, where the claims were also barred by the applicable five-year Missouri statute of limitations.

The Eighth Circuit denied KPERS' second petition for rehearing on September 9, 1997. On September 10, 1997, KPERS filed this — its fourth — petition for writ of certiorari in this case.

REASONS FOR DENYING THE WRIT

I. A MANDATORY CERTIFICATION OR STAY RULE IS UNNECESSARY AND WOULD BE PARTICULARLY INAPPROPRIATE IN THE CIRCUMSTANCES OF THIS CASE.

KPERS contends that principles of "cooperative judicial federalism" justify imposition of a mandatory rule compelling federal courts to certify issues of state law to state courts, or to stay federal proceedings, whenever "a State is litigating its own claims under its own law in federal court, and where the litigation turns on a state-law issue of first impression." Pet. at 12.

Principles of cooperative judicial federalism, however, are not at issue in this case, and even if they were, they are adequately protected by existing certification standards.

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[12] *See KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, Nos. 96-3262, 96-3317, 96-3680, Plaintiff-Appellant's Second Petition for Rehearing and Suggestion for Rehearing *En Banc* (8th Cir. filed July 16, 1997) ("KPERS' 2d Pet. for Reh'g").

Indeed, KPERS' proposed rule would not even apply in this case where (1) the "State" of Kansas is not a litigant, (2) Missouri, not Kansas, law provides the rule of decision, and (3) the court of appeals did not decline to certify any issue of first impression.

Application of any mandatory certification rule to the facts of this case would also run counter to the settled practice of denying requests for certification that are intended to circumvent a prior adverse ruling.

A. Federalism Concerns Are Not at Stake in this Case and Are Adequately Safeguarded By Existing Certification Standards When Presented.

1. *KPERS III*, Not the Kansas Supreme Court's Recent Decision, Is Dispositive of the Statute of Limitations Applicable in This Case.

KPERS' attack on the exercise of federal court jurisdiction in this case as an affront to Kansas state sovereignty is unfounded hyperbole. KPERS' federalism argument amounts to nothing more than a complaint that one statute of limitations governs KPERS' claims pending in Kansas state court, while a different statute governs KPERS' claims in federal court in Missouri. That result, however, has nothing to do with the Eighth Circuit's refusal to certify Kansas state law issues to the Kansas Supreme Court.

The Eighth Circuit decided in *KPERS III* that, under the federal choice of law principles applicable to this case following its removal to federal court under the RTC's § 1441a removal provision, the forum's limitations law, including its borrowing statute, would govern the timeliness of KPERS' claims. *KPERS III*, 61 F.3d at 609-14. Thus, KPERS' claims are subject to the five-year Missouri statute of limitations unless fully barred by a shorter Kansas statute. Kansas limitations law — including the Kansas Supreme

Court's recent holding that KPERS' claims are subject to the special ten-year statute for KPERS — is relevant only insofar as it affects the operation of Missouri's borrowing statute. Here, the effect is simply to subject KPERS' claims to Missouri's five-year statute in lieu of (what has now been held to be) a longer limitations period in Kansas.

It is the federal choice of law analysis established in *KPERS III* — not challenged by KPERS in its petition for certiorari — that mandates application of the five-year Missouri statute to KPERS' Home Savings claims, even though the ten-year Kansas statute applies to KPERS' other claims pending in Kansas state court. Because Kansas limitations law does not provide the rule of decision in this case, neither deferral by the Eighth Circuit pending the Kansas Supreme Court's decision in the state court cases, nor reconsideration after that decision was issued, would have created uniformity between the statutes of limitations applied in this case and in KPERS' Kansas cases.

KPERS' claim that the Eighth Circuit's decision has somehow impeded the Kansas Supreme Court's ability "to articulate [its] own law," Pet. at 15, 18, is sheer obfuscation. The Kansas Supreme Court's latest pronouncement of state limitations law applicable to KPERS will henceforth govern in those cases — in state or federal court — where Kansas law provides the rule of decision. The fact that the decision has no impact on the outcome of this particular case pending in federal court in Missouri does not impinge on principles of "cooperative judicial federalism."

2. Current Standards for Certification Adequately Safeguard Cooperative Judicial Federalism and Need No Revision.

Even if this case did present federalism concerns, the interests of federalism would be adequately protected by the existing standards governing certification of state law issues.

There is no need for a mandatory certification rule to forestall a supposed growing disregard by federal courts for state interests. Pet. at 14. Forty-four states provide a mechanism for federal courts to certify unsettled questions of state law to state high courts.[13] This Court has already instructed federal courts on the desirability of utilizing state certification procedures in cases where it is appropriate. *See, e.g., Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960); *Lehman Bros. v. Schein*, 416 U.S. 386 (1974).

Federal courts have heeded this Court's instruction and have not hesitated to avail themselves of state certification procedures *when warranted*.[14] Recent survey research shows that 83% of federal circuit judges regard certification as a practical procedure for litigants notwithstanding the attendant delay and expense. Jona Goldschmidt, *Certification of Questions of Law: Federalism in Practice* 67

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[13] *See* Unif. Certif. Questions of Law (1995), Prefatory Note, 12 U.L.A. 69 (1996).

[14] Support for certification among judges increased throughout the 1980's and 1990's, and the number of questions certified by federal courts is on the rise. Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. of Legis. 127, 165 (1992). Between 1990 and 1994 federal courts of appeal certified questions of state law 70% of the time that certification was sought. Jona Goldschmidt, *Certification of Questions of Law: Federalism in Practice* 28 (American Judicature Soc'y 1995). The frequency of certification in the Eighth Circuit is 69%, consistent with federal courts nationally. *Id.*

(American Judicature Soc'y 1995).[15] State-federal judicial councils composed of federal judges and state supreme court justices have encouraged federal judges to certify questions of law in proper cases. *Id.* at 45 n.121, 105-06. These efforts demonstrate the federal courts' sensitivity to issues of state sovereignty and an active commitment to using certification procedures where it will advance such interests.

Use of the certification procedure in a given case, however, has always "rest[ed] in the sound discretion of the federal court." *Lehman Bros.*, 416 U.S. at 391.

> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used.

Id. at 395 (Rehnquist, J., concurring). This Court has eschewed any suggestion that it should prescribe how federal courts are to go about determining state law with mechanistic approaches such as mandatory certification. *See id.* at 393 (Rehnquist, J., concurring) ("a sensible respect for the experience and competence of the various integral parts of the federal judicial system suggests that we go slowly in telling the courts of appeals or the district courts how to go about deciding cases"). Correctly predicting state law, while important, is not always paramount, and courts balance many

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[15] Only 8% of circuit judges reported that the practicality of certification was outweighed by considerations of delay and expense; another 8% were unsure. *Id.* Most federal judges surveyed reported being highly satisfied with their prior certification experience. *Id.* at 110. *See also* Carroll Seron, *Certifying Questions of State Law: Experience of Federal Judges* 10 (Fed. Judical Ctr. Jan. 1983) (84% of surveyed judges found procedure "extremely useful").

factors when weighing whether certification is appropriate.[16] Even where the elements of state certification procedures are met, other considerations — such as whether the request is a dilatory tactic or an attempt to circumvent an adverse ruling or will overburden a state's high court — frequently weigh against certification.[17]

Federal district and appeals court judges, considering the issues presented in light of the procedural history of a case and local certification practice, are capable of weighing the factors for and against certification. A mandatory certification rule would preempt consideration of these traditional factors.

B. The Eighth Circuit Properly Declined To Certify the Question of Whether KPERS Performs a Proprietary Function.

Under established certification standards, or even KPERS' proposed mandatory certification rule, certification of the question of whether KPERS performs a proprietary function for purposes of Kansas limitations law would not have been warranted. Applying a mandatory certification rule in this case would actually *undermine* principles of cooperative judicial federalism by promoting certification of questions not meeting any recognized certification criteria.

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[16] *See, e.g., Hatfield v. Bishop Clarkson Mem'l Hosp.*, 679 F.2d 1258, 1261 (8th Cir. 1982) ("In determining whether to exercise our discretion in favor of certification, we consider many factors.").

[17] *See, e.g.*, Goldschmidt, *supra* at 109 (federal judges should be selective in their certification so as not to unduly burden state courts and should disallow certification when sought as a dilatory tactic).

1. Certification Is Appropriate Only When There Is No Controlling State Precedent.

The standard for certification applied by the Eighth Circuit, already quite liberal, was not met in this case. The Eighth Circuit will certify an issue of state law only when there is an "absence of controlling precedent in the decisions of the [state court] which would enable this court to reach a sound decision without indulging in speculation or conjecture." *Kulinski v. Medtronic Bio-Medicus, Inc.*, 112 F.3d 368, 372 (8th Cir. 1997) (certifying issue that had never been addressed by a state appellate court).[18] The Eighth Circuit's standard is consistent with the certification procedures adopted by Kansas and the vast majority of states that provide for certification.

Like courts in virtually all states with certification procedures, the Kansas Supreme Court is empowered to answer certified questions only if there is "*no controlling precedent*" that would answer the certified question. *See* K.S.A. § 60-3201 (permitting the Kansas Supreme Court to "answer questions of law . . . as to which it appears to the certifying court there is no controlling precedent"). The Uniform Certification of Questions of Law Act (1967 Act) — the source of the Kansas certification procedure and that of 28 other states — also contains the "no controlling precedent" restriction. *See* Unif. Certif. Questions of Law Act (1967 Act), 12 U.L.A. 3 (Supp. 1997) (Table of Jurisdictions Wherein Act Has Been Adopted). The Act was recently revised to "make it clear that certification is appropriate only when there is no 'controlling constitutional provision, statute or appellate decision' in the receiving

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[18] *See also Perkins v. Clark Equip. Co.*, 823 F.2d 207, 209 (8th Cir. 1987) ("without a 'close' question of state law or the lack of state sources, a federal court should determine all the issues before it").

State" and that the existence of controlling precedent is "a barrier to answering a certified question." Unif. Certif. Questions of Law (1995) § 2 cmt., § 3 cmt., 12 U.L.A. 72-73 (1996).

Moreover, certification has never been considered appropriate where there exists in state law a settled analytical framework to resolve the issue, and certification would be nothing more than a request for the state court to apply the analysis to new facts.[19] In this case, the district court and Eighth Circuit concluded that Kansas Supreme Court precedent expressly holding that KPERS performs a proprietary function, as well as the settled criteria applied by the Kansas Supreme Court to determine when a state agency is engaged in proprietary activity, clearly established that KPERS' investment activity was a proprietary function. Indeed, the courts below found authority from *every* branch of Kansas government supporting this conclusion.[20] Thus, even under KPERS' proposed certification rule — mandating certification of "*state-law issue[s] of first impression*," Pet. at 12 (emphasis added) — certification would not have been proper in this case.

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[19] *See, e.g., In re Medill*, 119 B.R. 685, 688 (Bankr. D. Minn. 1990) ("The lines of authority for the present inquiry are settled, and certification is not warranted."); *Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1247 (5th Cir. 1997) ("Alone, the absence of a definitive answer from the state supreme court on a particular question is not sufficient to warrant certification."); *Swearingen v. Owens-Corning Fiberglass Corp.*, 968 F.2d 559, 564 (5th Cir. 1992) ("under the plain language of [the statute], [the] decisional analysis is relatively straightforward" even without a high court opinion directly confronting the issue).

[20] *See KPERS VI*, 114 F.3d at 687 (citing *In re Midland Indus.*, 703 P.2d 840, 843 (Kan. 1985), and *Shapiro v. KPERS*, 532 P.2d 1081 (Kan. 1975)); 79 Op. Att'y Gen. Kan. 55, 1979 Kan. AG LEXIS 262, at *7-8 (1979).

The fact that the Kansas Supreme Court subsequently disagreed with the federal courts' interpretation of existing precedent does not alter the conclusion that, at the time certification was requested, it was not warranted. Otherwise, the ever-present possibility of an incorrect decision would require the federal courts to certify all state law issues to the state courts in every case.

2. Certification Is Never Appropriate When Sought To Circumvent an Adverse Ruling by the Federal Court.

Certification of the governmental-proprietary question would not have been proper in this case even if the elements of the Kansas certification statute were met. The "right time to certify a question *is before the first federal decision on the point*. Certification eliminates the need to expend judicial resources predicting how another court will decide a question. Once [a federal court has] invested the time and effort to make the prediction, the costs have been sunk." *National Cycle, Inc. v. Savoy Reinsurance Co.*, 938 F.2d 61, 64 (7th Cir. 1991) (emphasis added).

In the Eighth Circuit, as in other circuits, certification is denied when it is sought only after the federal court has handed the movant an adverse ruling:

> The practice of requesting certification after an adverse judgment has been entered should be discouraged. Otherwise, the initial federal court decision will be nothing but a gamble with certification sought only after an adverse decision. Once a question is submitted for decision in the district court, the parties should be bound by the outcome unless other grounds for reversal are present.

Perkins v. Clark Equip. Co., 823 F.2d 207, 210 (8th Cir. 1987).[21]

KPERS made a tactical decision not to seek certification of the question of whether KPERS performs a proprietary function, and thus is immune from otherwise applicable Kansas statutes of limitations, until *after* the district court had expressly rejected this argument and after the Eighth Circuit had held in *KPERS III* that KPERS' claims are subject to the two- and three-year Kansas statutes through operation of the Missouri borrowing statute. As the district court found, KPERS' ultimate decision to request certification of the governmental/proprietary issue, after the case had been remanded for application of the Eighth Circuit's *KPERS III* decision, was nothing other than an "attempt[] to avoid the impact of [that] decision." *KPERS v. Reimer & Koger Assocs., Inc.*, No. 92 CV 922, Order (W.D. Mo. Oct. 25, 1995). For this reason alone, the request was properly denied.

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[21] *See also In re Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984) (movant should not be allowed "a second chance at victory" after an adverse ruling when "district court employed a reasonable interpretation of state law"); *Harris v. Karri-On Campers, Inc.*, 640 F.2d 65, 68 (7th Cir. 1981) (denying certification sought on appeal after loss in district court); *Massengale v. Oklahoma Bd. of Examiners in Optometry*, 30 F.3d 1325, 1331 (10th Cir. 1994) ("[w]e generally will not certify . . . when the requesting party seeks certification only after having received an adverse decision"); *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988) (certification not available where sought "after the district court made a decision unfavorable" to plaintiff); *Boston Car Co. v Acura Auto. Div.*, 971 F.2d 811, 817 n.3 (1st Cir. 1992) ("We agree with the Eighth Circuit that the practice of requesting certification after an adverse judgment has been entered should be discouraged.").

3. A Mandatory Stay is Not Called For in this Case.

KPERS' argument that a stay of proceedings in the Eighth Circuit was, or should be, mandatory in the circumstances of this case warrants little attention. Abstention presents "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it," and its invocation "is the exception, not the rule." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14 (1983) (quotations omitted).[22] The same reasons that make a mandatory stay pending certification inappropriate in a case like this would also render abstention without certification improper.

Moreover, in contrast to the "vital" and "truly novel" state law issues involved in *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968), which KPERS contends is controlling here, Pet. at 16, this case is a commonplace tort action for money damages. *See KPERS IV*, 77 F.3d at 1071 ("KPERS has sued several defendants to recover money it lost in a bad investment. This case only requires the conduct of the defendants be measured against the duties imposed by tort and securities law.").

Kaiser is also distinguishable in that it was a diversity case where the pending state court proceedings provided the law of decision for the federal court. As a result, a stay of the federal case was deemed appropriate to ensure that the parties would be given the benefit of the same law applied by the state court. The potential for inconsistency raised in

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[22] *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989) (as a general rule, "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred"); *Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497, 1505 (8th Cir. 1992) ("Our own precedent demands a narrow view of the abstention issue.").

Kaiser, however, would not be obviated in this case by deferring to the Kansas Supreme Court, since federal choice of law principles mandate application of Missouri's statute of limitations and borrowing statute, not Kansas limitations law. The Kansas Supreme Court's holding that KPERS is subject to a ten-year statute of limitations merely alters the analysis under the Missouri borrowing statute; it does not result in application of the ten-year Kansas statute.

II. BECAUSE THE COURT OF APPEALS HAS ALREADY HAD AN OPPORTUNITY TO CONSIDER THE IMPACT OF THE RECENT KANSAS SUPREME COURT OPINION ON ITS OWN DECISION IN THIS CASE, GRANTING CERTIORARI TO VACATE AND REMAND WOULD SERVE NO PURPOSE.

This Court has used the "grant, vacate and remand" procedure where:

> intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.

Lords Landing Village Condo. Council of Unit Owners v. Continental Ins. Co., 117 S. Ct. 1731, 1732-33 (1997). The criteria for issuing a GVR do not exist in this case.

First, the Eighth Circuit has already considered the effect of the Kansas Supreme Court's recent decision on the judgment below. KPERS brought the decision to the attention of the Eighth Circuit in its second petition for

rehearing,[23] where it argued, as it does here, that the Eighth Circuit was required to grant a rehearing or recall its mandate to conform its ruling to the Kansas Supreme Court's decision. *See* KPERS' 2d Pet. for Reh'g. As the defendants argued in opposition to KPERS' second rehearing petition, application of the Kansas Supreme Court's opinion would not change the outcome of this case because even if the special ten-year Kansas statute of limitations is applicable to KPERS' claims (rather than the two-year statute applied by the district court), the claims are still barred by the five-year Missouri statute. For this reason, reconsideration of the district court's judgment in light of the Kansas Supreme Court's decision would merely result in affirmance on that alternative ground, and GVR would be a pointless exercise.

KPERS buries its discussion of this alternative ground for affirmance in the final footnote of its petition, where it raises several cryptic arguments for why the result in this case might be different in light of the Kansas Supreme Court's recent decision. Pet. 21 n.27. The simple response to all of those arguments is that the effect of the Missouri statute of limitations on the record in this case was fully briefed and argued in the district court and on appeal, and the district court's ruling, upheld by the Eighth Circuit, that KPERS' claims all accrued more than five years before it filed suit is dispositive under the five-year Missouri statute of limitations.

Even assuming KPERS could overcome the barrier of the Missouri five-year statute, however, certiorari would still not be warranted here because the sole issues that would be addressed in further proceedings would not involve the sovereign interests of Kansas in the application of its *own*

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[23] *See* KPERS' 2d Pet. for Reh'g.

state statutes, but merely the proper application of the Missouri statute in a single case.

CONCLUSION

For the reasons stated above, the Writ of Certiorari should be denied.

Respectfully submitted,

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November 17, 1997

(4)

Supreme Court, U.S.
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No. 97-471

In The

Supreme Court of the United States

October Term, 1997

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C., A Law Partnership, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS DREISESZUN, OZAR AND THE ESTATE OF FRANK S. MORGAN

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QUESTIONS PRESENTED

1. Where federal choice-of-law issues under familiar *Erie* principles have been finally adjudicated in a prior appeal, establishing the proper limitations analysis, should the federal appellate court in a subsequent appeal delay its decision for federalism concerns until a state court determines a limitations question in unrelated litigation that cannot affect the outcome of the case?

2. Is the GVR procedure appropriate where the federal appellate court was aware of the state court decision, where a remand would require application of a different state's limitations laws rather than those interpreted by the state court, and where reconsideration on remand would not affect the outcome but would play into a larger, manipulative litigation strategy which the petitioner is admittedly trying to pursue?

LIST OF PARTIES

Petitioner is the Kansas Public Employees Retirement System ("KPERS"), the plaintiff and appellant below.

Respondents on this brief are: Thomas S. and Marilyn J. Morgan, co-executors of the estate of Frank S. Morgan; Sherman Dreiseszun; and I.I. Ozar, all defendants and appellees below.

Other respondents are: KPMG Peat Marwick and Robert Spence; Shook, Hardy & Bacon, P.C., Shook, Hardy & Bacon, and Frank Sebree; Blackwell Sanders Matheny Weary & Lombardi, L.C.; and Reimer & Koger Associates, Inc. and certain of its former employees (Ken Koger, Ron Reimer, Clifford Shinski, Brent Messick and Robert Crew).

In addition, the Resolution Trust Corporation ("RTC") was a party to this case.

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BRIEF IN OPPOSITION OF RESPONDENTS DREISESZUN, OZAR AND THE ESTATE OF FRANK S. MORGAN

Respondents Dreiseszun, Ozar and the Estate of Frank S. Morgan respectfully request that the Court deny the petition for a writ of certiorari seeking review of the Eighth Circuit's most recent decision in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 114 F.3d 697 (8th Cir. 1997) (*"KPERS VI"*), and is included in the Appendix to the Petition at App. 1a-23a.[1] The order of the court of appeals denying rehearing is included in the Appendix to the Petition at App. 24a. The order of the court of appeals denying KPERS' second petition for rehearing out of time or alternative motion to recall the mandate is included in the Appendix to this Brief at R. App. 1. The district court decisions granting summary judgment on statute of limitations grounds are unreported and are included in the Appendix to the Petition at App. 27a-100a. Previous opinions of the court of appeals in this case are reported: *KPERS v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614 (8th Cir. 1993), *cert. denied*, 511 U.S. 1126 (1994) (*"KPERS I"*); *KPERS v. Reimer & Koger Assocs., Inc.*, 60 F.3d 1304 (8th Cir. 1995) (*"KPERS II"*); *Boatmen's First Nat'l Bank v. KPERS*, 57 F.3d 638 (8th Cir. 1995); *KPERS v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608

[1] References to the Appendix to the Petition are "App. ___a." References to the Appendix to this brief in opposition are "R. App. ___."

(8th Cir. 1995), *cert. denied*, 116 S. Ct. 915 (1996) (*"KPERS III"*); *KPERS v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063 (8th Cir.), *cert. denied*, 117 S. Ct. 359 (1996) (*"KPERS IV"*); *In re KPERS*, 85 F.3d 1353 (8th Cir. 1996) (*"KPERS V"*).

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1997. Rehearing was denied on June 12, 1997. The court of appeals' order denying KPERS' second petition for rehearing out of time, or alternative motion to recall the mandate based on a state court decision in unrelated litigation, was entered on September 9, 1997. R. App. 1. The Petition was filed on September 10, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was based upon 28 U.S.C. § 1291, and in the district court upon 12 U.S.C. § 1441a(*l*).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Mo. Rev. Stat. § 516.190 (the "borrowing statute"):

> Whenever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state.

12 U.S.C. § 1441(a)(*l*)(1):

> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [Resolution Trust] Corporation is a

party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit or proceeding.

STATEMENT OF THE CASE

A. Factual and Procedural Background

This case has been extensively litigated for several years in the district court and court of appeals, resulting in multiple reported opinions. The court of appeals' most recent opinion in *KPERS VI*, for which review is now being sought, App. 1a-23a, accurately recounts the factual and procedural background of this federal litigation. Accordingly, this statement of the case provides only a brief overview of the extent to which the courts below have studied this case, and the extraordinary time the federal judiciary has devoted to KPERS' investment-based claims over the last five years.

KPERS invested in 1986 in high yield, high risk subordinated debentures issued by Home Savings Association of Kansas City, N.A. ("HSA"). Respondents Morgan, Dreiseszun and Ozar (the "Home Savings defendants") were directors of HSA.[2] KPERS' investment in these HSA debt securities was part of a program undertaken by KPERS to place a small portion of its portfolio in local but higher risk offerings. Many of these risky investments of the 1980's paid handsome returns, but others have

[2] Frank Morgan died in October 1993, and his estate was substituted as defendant in the case.

evolved into lawsuits seeking recovery of investment losses brought by KPERS in the 1990's.

The events and facts upon which KPERS' various investment claims in this case are based – HSA's failure to acquire a St. Louis thrift, HSA's regulatory compliance, and KPERS chairman Michael Russell's dealings with HSA and affiliate banks – were known to the KPERS board and its many advisors beginning in early 1986 and continuing in the ensuing years. Rather than take any action, KPERS deliberately chose to wait and see how the HSA investment would play out, and collected about 45% of its principal from HSA's interest payments on the debentures. HSA was placed in receivership under control of the Resolution Trust Corporation in 1991, and the RTC declared the KPERS' investment worthless.

In the wake of the HSA receivership, and following a highly critical legislative inquiry into KPERS' investment practices, KPERS retained private, contingent fee counsel and filed a series of lawsuits in the Kansas state court. The Home Savings defendants were added to this case in December 1991, more than five years after KPERS was on notice of the facts on which its claims were based. The HSA case was unique, in that the HSA investment was KPERS' only foray into the field of a federally insured institution, bringing into play the role and federal statutory rights of the RTC as HSA's receiver and the new obligor on the securities purchased by KPERS. This case is the only one to which the three Home Savings defendants were parties. After the RTC was joined as a party in this case, it removed the entire case to the Western District of Missouri, pursuant to 12 U.S.C. § 1441a(*l*). From that point in the litigation through today, the case was, in the

language of the federal jurisdictional statute, "deemed to arise under the laws of the United States." KPERS' motion to remand was denied, and the court of appeals affirmed in *KPERS I*. 4 F.3d at 614. The current line-up of the parties was established in *KPERS II*. 60 F.3d at 1304.[3]

The court of appeals' decision in *KPERS III*, 61 F.3d at 608, set the stage for the dismissal of the case as untimely which led to the current petition for a writ of certiorari. Applying familiar federal choice of law principles, the court of appeals held that the district court should apply the limitations law of the forum state, Missouri, which included the "borrowing statute," Mo. Rev. Stat. § 516.190, and held on state law grounds that a new Kansas ten year limitations statute, Kan. Stat. Ann. § 60-522, did not purport to revive barred claims. *KPERS III*, 61 F.3d at 615. For its own strategic reasons, KPERS did not contest in *KPERS III* the earlier district court ruling that KPERS was subject to statutes of limitations because its investment activities were conducted in a proprietary capacity nor did KPERS seek a certification of that issue to the state court. Under the choice of law analysis established in *KPERS III*, the district court was directed on remand to determine whether KPERS' various claims were barred under the Kansas two and three year statutes of limitation, Kan. Stat. Ann. §§ 60-513(a) and 60-512. *KPERS III*, 61 F.3d at 614-16. KPERS sought in a petition for rehearing to have the applicability of the new Kansas ten year statute certified to the state court,

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[3] In the meantime, the Eighth Circuit reviewed KPERS' claims against the trustee of the HSA debentures. *Boatmen's First Nat'l Bank v. KPERS*, 57 F.3d 638 (8th Cir. 1995).

but did not ask this Court to review the denial of certification in the subsequent petition for a writ of certiorari. Nor did KPERS seek certification of the question of its alleged immunity from limitations defenses, the issue KPERS now argues should have been certified in the current appeal.

Faced with virtual certainty that this case would be found untimely under the *KPERS III* decision, KPERS embarked on a series of abusive tactics intended to delay dismissal while it set up the limitations question in the other state court cases it had filed (which involved other investments and to which the Home Savings defendants were not parties), trying to create a federal court/state court conflict. These other cases remained and still pend in the Kansas courts because of the absence of any federal issue, like the RTC's involvement in this case. One of KPERS' gambits was to sue some of the defendants in this case in new state court cases, which led to the preliminary injunction affirmed by the court of appeals in *KPERS IV*, 77 F.3d at 1063.[4] Another move was KPERS' attempt to disqualify the district judge, which the court of appeals rejected in *KPERS V*, 85 F.3d at 1353 (describing KPERS' many abusive and dilatory litigation tactics).

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[4] KPERS has not sought review in the current petition of the court of appeals' permanent injunction. App. at 23a. In *KPERS IV*, the court of appeals carefully considered and rejected KPERS' argument for "*Burford* abstention," 77 F.3d at 1071, an argument KPERS does not rely on in its current Petition.

B. The District Court and Court of Appeals' Decisions

KPERS' delay tactics in this federal litigation allowed it to push the statute of limitations issue forward in the other, unrelated state court cases it had filed over other investments. Under the *KPERS III* mandate, however, there was no reason in this case to await developments in the unrelated Kansas cases because the limitations issue in this case was controlled by the Missouri borrowing statute, Mo. Rev. Stat. § 516.190, under federal choice-of-law principles. *KPERS III*, 61 F.3d at 611-14. Accordingly, with all fact discovery completed, the district court conducted a series of hearings over three days on the defendants' motions for summary judgment.

The district court held that KPERS and its board of trustees (as well as its agents) were on actual notice of facts that triggered the running of the limitations on its claims against the three Home Savings defendants as early as December 1986. App. 36a-44a, 64a-65a. It therefore followed that all of the claims asserted by KPERS against the Home Savings defendants in December 1991 were barred under the Kansas limitations statutes, thus providing a complete defense under the Missouri borrowing statute, Mo. Rev. Stat. § 516.190. App. 65a-68a.[5]

The court of appeals affirmed in its seventh unanimous opinion in this litigation. It correctly viewed the

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[5] The district court also held "for the third time" that KPERS was performing a proprietary function when it invested in the HSA subordinated debentures, and thus that KPERS was subject to limitations defenses in litigation relating to that investment. App. 54a.

prior *KPERS III* decision as the established limitations rule, and determined that KPERS presented no compelling reason to revisit the law of the case, or to certify questions already ruled in *KPERS III* to the state court for a new look. App. 12a-15a and note 11. The court of appeals noted that the record was clear that KPERS itself was on actual notice of facts sufficient to trigger a limitations period in October-November 1986, App. 4a-6a, 16a-17a, more than five years before the Home Savings defendants were sued in December 1991, and that in any event notice to KPERS was beyond any fair question by September 1988, App. 18a and note 13, making the case untimely under the two and three year limitations periods established through the federal choice-of-law analysis in *KPERS III*. Accordingly, the summary judgment for all defendants was affirmed, and both of KPERS' petitions for rehearing were denied.

C. The Subsequent Kansas Supreme Court Decision

On June 27, 1997 the Kansas Supreme Court issued its decision in *KPERS v. Reimer & Koger Assocs., Inc., et al.*, 941 P.2d 1321 (Kan. 1997), 1996 WL 374595, involving combined interlocutory appeals in state court cases involving other KPERS investments in companies with no federally-insured deposits, unlike HSA. The three Home Savings defendants were not parties in any of the various other KPERS lawsuits that were involved in the Kansas Supreme Court decision. In a lengthy opinion, the state court ultimately held that KPERS is subject to statutes of limitations from and after the enactment of Kan. Stat. Ann. § 60-522 (the ten year, special KPERS statute) in

1992. 1997 WL 374595 * 30. The court disagreed with the Eighth Circuit's decision in *KPERS III* that the special ten year statute did not revive barred claims. *Id.* at * 31. The recent state court decision, the court of appeals' *KPERS III* decision, and the court of appeals' current decision in *KPERS VI*, are consistent on the one point relevant here – KPERS is subject to limitations defenses in all of its investment-related litigation, including this case.

REASONS FOR DENYING THE WRIT

1.a. This case is highly unusual in that the court of appeals has reviewed the case seven times over five years. It is and was intimately familiar with all of the KPERS litigation, both the federal Home Savings case that came to it via the RTC and its removal statute, 12 U.S.C. § 1441a(*l*), and the various other Kansas state court cases that KPERS continues to pursue. The court of appeals was provided with a copy of the Kansas Supreme Court's recent opinion in connection with KPERS' second petition for rehearing, and thus had an opportunity to consider the state court pronouncements against the backdrop of five years of federal court proceedings chronicled in *KPERS I* through *KPERS VI*. No reasonable expectations were unsettled, and no inappropriate federal encroachment on state law occurred, from the result in this case because it was driven by the federal removal statute, which in turn was triggered by KPERS' own decision to invest in a federally-insured savings and loan association located in Missouri. That the court of appeals has devoted extensive resources to this case over the years suggests strongly that review by this Court at this time is

unnecessary and unwarranted based on the questions presented.

KPERS is a disappointed litigant, and each of its complaints with the court of appeals' *KPERS VI* decision really reflects no more than disagreement with the outcome. This is not a "federalism case" because this case came to the federal courts in Missouri through the RTC removal statute, bringing into play federal choice-of-law rules for limitations issues, *see Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147 (1987); *Del Costello v. International Bhd. of Teamsters*, 462 U.S. 151, 158-60 (1983), and these federal rules would necessarily differ from cases that remained in the Kansas state courts where the RTC was not a party. The *KPERS VI* decision, for which review is now sought, was foreordained by the *KPERS III* decision which established the limitations law of the case without implicating any federalism concerns. Indeed, it is not at all unusual for federal courts to apply the limitations law of the forum state in cases where another state's substantive law may govern the merits, *see, e.g., Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *Wells v. Simmonds Abrasive Co.*, 345 U.S. 514 (1953); *Cope v. Anderson*, 331 U.S. 461 (1947), and that is all that happened here. *KPERS III*, 61 F.3d at 611 (citing *Cope*). *Cf. DeWeerth v. Baldinger*, 38 F.3d 1266, 1274 (2d Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 512 (1994). KPERS' professed concerns for federalism are really only its way of arguing that it believes the Eighth Circuit erred, and that is not a good reason for this Court to review a procedurally unique case that the court of appeals has reviewed seven times already.

b. Certification of questions of Kansas law to the Kansas Supreme Court was not required or even appropriate in this case because the *KPERS III* decision set the stage for all that was to follow. KPERS' attempt to dress up the case in federalism terms is not persuasive. The federal choice-of-law analysis under the *Erie* doctrine in *KPERS III*, 61 F.3d at 611-612, resulted in the law of this case that KPERS is subject to limitations defenses and that the forum state's limitations law controls. *Id.* at 614. In the later *KPERS VI* appeal, there was nothing to certify to the state court that could have altered that part of the prior *KPERS III* decision. The Kansas certification statute, Kan. Stat. Ann. § 60-3201, allows state court review only for questions that "may be determinative of the cause," which was plainly not the case here in view of *KPERS III*.

The recent Kansas Supreme Court decision is consistent with *KPERS III* in holding that KPERS is subject to limitations defenses; the two courts part company only in their view of whether the new Kansas ten year statute of limitations operates to revive KPERS' barred claims. *KPERS III* held that the special ten year statute of limitations did not apply in this case because it did not revive barred claims. 61 F.3d at 615-616. In the *KPERS VI* appeal, it would have been inappropriate for the court of appeals to presume that the Kansas court would reach a different conclusion from *KPERS III*, and thus the court of appeals properly declined to certify this issue, especially since it had declined this same invitation during the rehearing process in *KPERS III*.[6] Moreover, in *KPERS VI*, and as

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[6] Certification of this question in *KPERS III* would not have been appropriate under Kan. Stat. Ann. § 60-3201 because the

argued in the Petition, KPERS was seeking certification of the question of whether it is subject to any limitations defense, App. 14a-15a, n.11, an irrelevant question in view of the 1992 enactment of the special ten year statute for KPERS. If either aspect of the Kansas limitations law had been certified to the state court, or if the state court had gotten its decision out before the opinion in *KPERS VI*, then the Missouri borrowing statute, Mo. Rev. Stat. § 516.190, would not apply and the district court's summary judgment would have been analyzed under the Missouri five year statute of limitations to the same end – KPERS' 1991 claims were time barred by its notice in 1986. Because the result is the same under either state's limitations law, certification would have been a wasted effort. Besides, the court of appeals had the opportunity to consider the Kansas court's views in connection with KPERS' second petition for rehearing. R. App. 1.

c. Certification of state law questions should never be mandatory. As in the abstention area, courts must have the ability to analyze and react to different fact situations and procedural contexts in order to make an informed discretionary judgment on whether to certify a question to the state courts. *See Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). This case presents a good example of why the mandatory "certification or stay" rule for which KPERS seeks the Court's review would be a bad rule. The case

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statute is invoked only for "determinative" questions, which was not the case, and questions for which there is "no controlling precedent." The Eighth Circuit's decision on this issue in *KPERS III*, in contrast, was guided by *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, 831 P.2d 958 (1992).

was in a unique procedural posture in view of the RTC's invocation of its interstate removal rights under 12 U.S.C. § 1441a(*l*), a situation unlikely to occur often, especially since the RTC no longer exists. The case had already been the subject of extensive federal appellate review. The claims asserted by KPERS were untimely under the Missouri five year statute of limitations, and under the two and three year Kansas statutes identified in *KPERS III*. The only way that KPERS' claims could have survived in *KPERS VI* would have been a reversal of the federal law holding in *KPERS III*, a result that "certification or stay" could not achieve. Moreover, this is not a case within the *Pullman* abstention doctrine, because the Eighth Circuit was not being asked in *KPERS VI* to invalidate any state law. *Cf. Arizonans For Official English v. Arizona*, ___ U.S. ___, 117 S. Ct. 1055, 1073 (1997). Indeed, in *KPERS III*, the court of appeals interpreted the controlling Kansas precedent so as to avoid the "troublesome" constitutional questions asserted by the Home Savings defendants. *KPERS III*, 61 F.3d at 616. In short, the court of appeals made a reasoned and correct discretionary decision not to certify an irrelevant question to the Kansas court. A rule that would strip the courts of appeals of their ability to exercise an informed discretion in these situations would not promote federalism, but rather would simply delay and increase the costs for the administration of justice in the federal courts.

2.a. This Court's grant, vacate and remand procedure ("GVR") is not appropriate in this case because: (a) the court of appeals had an opportunity to consider the state court decision; (b) remand would result in the application of Missouri law, rather than the intervening

rule announced by the Kansas court, and the outcome of the case would not change; (c) there was no error in the judgment reached by the court of appeals in *KPERS VI*, in view of the prior *KPERS III* decision; and (d) KPERS is trying to manipulate the GVR procedure in order to set up a whole new round of wasteful and needless litigation over its Home Savings investment.

The process for determining whether to invoke the GVR process is set forth in *Lawrence v. Chater*, ___ U.S. ___, 116 S. Ct. 604 (1996):

> Where intervening developments, or recent developments that *we have reason to believe the court below did not fully consider*, reveal a reasonable probability that the decision below rests upon a *premise that the lower court would reject if given the opportunity* for further consideration, and where it appears that such *a redetermination may determine the ultimate outcome of the litigation*, a GVR order is, we believe, *potentially appropriate*. Whether a GVR order is *ultimately appropriate* depends further on the equities of the case: *if it appears that the intervening development*, such as a confession of error in some but not all aspects of the decision below, *is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court*, a GVR order is inappropriate.

116 S. Ct. at 607 (emphasis added). In this case, the threshold test on whether the GVR procedure is "potentially appropriate" is not met, and the "equities of the

case" compel the conclusion that the court of appeals' decision should not be disturbed.[7]

b. This is not a case where the Kansas court disapproved of prior decisions on which the Eighth Circuit relied in *KPERS VI*. Indeed, on the question of whether the new Kansas ten year statute revived barred claims – the issue resolved in this case in *KPERS III* – both courts relied on the language of the statute, with the Eighth Circuit applying the rule of *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, 831 P.2d 958 (1992), *see KPERS III*, 61 F.3d at 614-616, and the Kansas court refusing to "enter into a discussion of the application of *Harding*," *see KPERS*, 1997 WL 374595 at *31.[8] In *KPERS VI*, the case for which review is now sought, there really is no inconsistency between the courts other than the state court's disagreement with the result in *KPERS III*. Moreover, as demonstrated in Part 1.b., a remand of this case would not change the result because the court of appeals would apply the Missouri five year statute of limitations, as

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[7] This case is not like *Huddleston v. Dwyer*, 322 U.S. 232 (1944), relied on by KPERS in the Petition at 10-11, 19, because in that case this Court had already granted the petition for a writ of certiorari. *See Stutson v. United States*, ___ U.S. ___, 116 S. Ct. 611 (1996) (Rehnquist, C.J., concurring). Accordingly, *Lawrence* provides the controlling test for GVR analysis.

[8] The Kansas court's tacit reaffirmation of its earlier *Harding* decision distinguishes this case from *Lord's Landing Village Condominium Council Of Unit Owners*, ___ U.S. ___, 117 S. Ct. 1731 (1997), where the new state court decision "explicitly disapproved" of the prior state precedent on which the court of appeals relied. *Id.* at 1733. In addition, the court of appeals' reliance on *Harding* occurred in *KPERS III*, not in *KPERS VI* for which the GVR order is now sought.

required by *KPERS III*, and KPERS' claims would still be barred. It would be a wasteful exercise to remand a case for the court of appeals to apply another state's law than the one that was "changed" in the new decision in order to reach the same result as has already been reached. Thus, under the test of *Lawrence v. Chater*, 116 S. Ct. at 607, this case is not "potentially appropriate" for the GVR procedure.

c. What KPERS is really trying to accomplish with its federalism arguments, and its request for a GVR order, is another round of litigation over its Home Savings investment. This is shown by the obscure comment in the last line of KPERS' last footnote that the "legal consequences of a decision based on the Missouri statute of limitations" might not be the same as the "legal consequences" of the Eighth Circuit's current decision in *KPERS VI*. Petition at 21, n.27. Though purposefully vague, what KPERS is saying is that if it can get this case remanded to the Eighth Circuit, where it knows it will lose again under the Missouri statute of limitations, it will sue again in the Kansas courts and argue that the federal judgment in this case is not binding if it is based on the Missouri statute. This Court's certiorari discretion is not appropriately exercised to aid a disappointed litigant trying to find a new forum perceived to be more hospitable to stale claims.

In the district court summary judgment proceedings, KPERS presented no evidence to create a triable question on whether it knew of the core facts of its claims prior to December 1986. App. 36a-44a. As the case against the Home Savings defendants was not filed until December 23, 1991, App. 8a, KPERS claims are just as barred under

the Missouri five year statute as they are under the Kansas two and three year statutes applied by the courts below. But KPERS wants a GVR order anyway because, as it suggests in its last footnote, Petition at 21, n.27, if the judgment in this case ends up being based on Missouri law, KPERS may argue in a new lawsuit that the "legal consequences" of this judgment do not preclude a new case in the Kansas courts. KPERS can take some comfort in this position from the Kansas Supreme Court's refusal to apply previous established Kansas law collateral estoppel principles against KPERS in its recent decision. *KPERS*, 1997 WL 374595 at *27-29.

Although this latest gambit by KPERS is not precisely the same kind of "manipulative litigation strategy" mentioned in *Lawrence v. Chater*, 116 S. Ct. at 607, it is highly relevant to the "equities of the case." The Court should not let its GVR process be used in this fashion, where the litigant cannot hope to alter the result already reached in the case by the court of appeals. *Cf. D.L. Thomas v. American Home Products, Inc.*, ___ U.S. ___, 117 S. Ct. 282, 283-84 (1996) (Scalia, J., concurring) ("When the conflict is of 'far more dubious . . . relevance' than the one at issue here, *post*, at 285, we can and should exercise our discretion to deny the petition for writ of certiorari."). There is no equity in favor of a litigant who purposefully ignores its potential investment claims while it waits to see how its returns fare over the long term. At bottom, there are no "potential benefits" to the just and fair outcome of this case from the GVR order sought by KPERS that would outweigh the inevitable costs and delay from further proceedings that are not necessary in order to be sure that the court of appeals reached the proper result. This is

especially true in this case where the court of appeals has reviewed the case seven times.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3262/3317/3680WMKC

Kansas Public Employees Retirement System,	*	
Appellant,	*	Appeal from the United Stats District Court for the Western District of Missouri
vs.	*	
Blackwell, Sanders, Matheny, Weary & Lombardi, etc., et al.,	*	
Appellees.	*	

Appellant's motion for leave to file a second petition for rehearing out of time has been considered by the court and is denied.

September 9, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

(5)

No. 97-471

Supreme Court, U.S.
FILED
NOV 17 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Petitioner,

v.

BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI, L.C., A LAW PARTNERSHIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS KPMG PEAT MARWICK LLP AND ROBERT W.L. SPENCE

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QUESTIONS PRESENTED

1. Whether the court of appeals was precluded from exercising its discretion to refuse to certify an issue to a state supreme court in the peculiar circumstances of this case.

2. Whether granting the petition, vacating the judgment below, and remanding for further consideration in light of a decision by the Kansas Supreme Court is appropriate where (1) the Eighth Circuit's decision does not rest upon any premise that the Eighth Circuit would now reject, (2) the Kansas Supreme Court's decision would have no effect on the ultimate outcome of this litigation, and (3) granting the petition would reward petitioner's abusive and manipulative litigation tactics.

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed by petitioner, the Resolution Trust Corporation was a third-party defendant in the district court, as well as a limited intervenor in that court.

Pursuant to Supreme Court Rule 29.6, respondent KPMG Peat Marwick LLP states that it is a limited liability partnership with no parent companies or publicly-held subsidiaries. Respondent Robert W.L. Spence is an individual.

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IN THE

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OCTOBER TERM, 1997

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KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Petitioner,

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BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI, L.C., A LAW PARTNERSHIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS KPMG PEAT MARWICK LLP AND ROBERT W.L. SPENCE

KPMG Peat Marwick LLP and Robert W.L. Spence ("Peat Marwick") respectfully submit this brief in opposition to the petition for a writ of certiorari filed by the Kansas Public Employees Retirement System ("KPERS").

This is the fourth petition for certiorari that petitioner has filed in this case, which has already resulted in seven published opinions from the United States Court of Appeals for the Eighth Circuit (with another appeal currently pending there). Contrary to what its tortured history would suggest, this is not inherently a particularly complicated case. Rather, as the Eighth Circuit has observed, the case involves garden-variety tort claims arising from petitioner's investment losses. *KPERS v. Reimer*

& Koger Assocs., Inc., 77 F.3d 1063, 1071 (8th Cir.) ("*KPERS IV*"), *cert. denied*, 117 S. Ct. 359 (1996). It is petitioner's litigating tactics that have added years—and multiple trips to the Eighth Circuit—to the life of this litigation.

Much of the litigation in this case has resulted from petitioner's admitted attempts to avoid federal jurisdiction and to circumvent an adverse July 1995 decision by the Eighth Circuit on the applicable statute of limitations. Once it was finally able to apply the Eighth Circuit's ruling to the facts of this case, the district court entered final judgment against petitioner, and the Eighth Circuit affirmed. It is from that decision that petitioner now seeks this Court's review.

The petition does not suggest that there is any conflict between the Eighth Circuit's decision and any decision of this Court or any other court of appeals. Instead, petitioner seeks certiorari on the question of whether this Court should replace the well-settled standards governing certification of state-law questions to state courts with a new rule that would *require* certification, though under what circumstances is not clear. This question seeks an advisory opinion only, however, because a ruling in petitioner's favor would have no impact on this case, and the unique factual circumstances of this case make it a particularly inappropriate vehicle for establishing a rule of general applicability. In any event, the Eighth Circuit's decision not to certify the state-law question in the decision under review was entirely correct.

Petitioner alternatively suggests that this Court should grant the petition, vacate the judgment below, and remand to the Eighth Circuit for reconsideration in light of a Kansas Supreme Court decision that post-dated the Eighth Circuit's decision. A GVR order would be inappropriate here, however, because the Eighth Circuit's decision does not rest on any premise that it would now reject and because the Kansas Supreme Court's decision would not

affect the ultimate outcome of this case. Moreover, a GVR order is inappropriate here for reasons this Court has previously identified in other cases: (1) it is part of an unfair or manipulative litigation strategy, and (2) the delay and further cost entailed in a remand are not justified by the potential benefits of future consideration by the lower court. To the contrary, this litigation should be permitted finally to come to an end by denial of certiorari.

DECISIONS BELOW

In addition to the decisions below referred to in the petition, the Eighth Circuit denied a second petition for rehearing *en banc* and for recall of the mandate on September 9, 1997.

Prior to the decision appealed from here, the Eighth Circuit decided that Missouri law applied to this case and that Missouri would borrow and apply a Kansas two-year statute of limitations for torts; this Court declined review. *KPERS v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608 (8th Cir. 1995) ("*KPERS III*"), *cert. denied*, 116 S. Ct. 915 (1996). The Eighth Circuit also issued reported decisions in five other related interlocutory appeals, two of which this Court declined to review. *In re KPERS*, 85 F.3d 1353 (8th Cir. 1996) ("*KPERS V*"); *KPERS v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063 (8th Cir.) ("*KPERS IV*"), *cert. denied*, 117 S. Ct. 359 (1996); *KPERS v. Reimer & Koger Assocs., Inc.*, 60 F.3d 1304 (8th Cir. 1995) ("*KPERS II*"); *Boatmen's First Nat'l Bank v. KPERS*, 57 F.3d 638 (8th Cir. 1995); *KPERS v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614 (8th Cir. 1993) ("*KPERS I*"), *cert. denied*, 511 U.S. 1126 (1994).

Subsequent to the decision appealed from here, petitioner also appealed to the Eighth Circuit an award of attorneys' fees and costs to Peat Marwick and others under 28 U.S.C. § 1927. That appeal is currently pending. *KPERS v. Reimer & Koger Assocs., Inc.*, Consolidated Case Nos. 97-1880 and 97-2811 ("*KPERS VII*").

STATUTES INVOLVED

Mo. REV. STAT. § 516.190 (the "Missouri borrowing statute") provides:

> Whenever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state.

12 U.S.C. § 1441a(*l*)(1) provides:

> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [Resolution Trust] Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

12 U.S.C. § 1441a(*l*)(3) provides:

> The [Resolution Trust] Corporation, in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the [Resolution Trust] Corporation has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the [Resolution Trust] Corporation as conservator or receiver of such institution. . . .

COUNTERSTATEMENT OF THE CASE

Petitioner portrays the Eighth Circuit as running roughshod over meritorious arguments and disregarding applicable law. In fact, it is petitioner that has acted unreasonably. The Eighth Circuit has properly applied the law in every respect.

1. Petitioner is the pension fund for certain state and municipal employees in Kansas, including the Kansas judiciary. In 1983, Kansas Governor John Carlin began to promote the use of a portion of petitioner's money to stimulate the Kansas economy. Petitioner's investment consultants advised petitioner at that time that investing public pension fund moneys as venture capital to promote regional business would be a high-risk undertaking. Nevertheless, in 1985, petitioner established a special "Kansas Investment Fund" to make direct investments in Kansas ventures. Petitioner's board allocated no more than 10% of petitioner's overall $2.6 billion fund to such investments.

One of petitioner's targeted investments was in a Kansas City savings and loan named Home Savings Association of Kansas City, N.A. ("Home Savings"). In all, petitioner invested $65 million in Home Savings. Home Savings was closed by federal bank regulators in 1991, and the Resolution Trust Corporation ("RTC") was appointed as receiver. Petitioner lost its $65 million in principal, though it had earlier received some $29 million in interest payments.

The seizure of Home Savings led to what the former chairman of KPERS characterized as a "political feeding frenzy" in Kansas. (Peat Marwick's Appendix in the Eighth Circuit, p. 1369.) As a result, petitioner filed suit in Shawnee County, Kansas, against its former investment advisor, which had been responsible for making petitioner's investment in Home Savings. About six months later, petitioner sued its former auditor, Peat Marwick, and the former officers and directors of Home Savings (the "Home Savings defendants").[1]

The RTC promptly moved to intervene in the case to protect its claims against Peat Marwick and the

[1] Petitioner's Sixth Amended Complaint is pleaded in fifteen counts and asserts a variety of standard tort theories, including common law fraud, statutory securities fraud, various breaches of fiduciary and professional duties, negligence, breach of contract, and civil conspiracy.

Home Savings defendants and to remove the case to federal court. Under federal law specifically enacted to deal with the savings-and-loan crisis, the RTC had the right to remove to federal court any case concerning a savings and loan of which it was the receiver. 12 U.S.C. § 1441a(*l*)(3). The Kansas judge to whom the case was assigned effectively blocked the removal by refusing to rule on the RTC's intervention motion. Eventually, the Home Savings defendants filed third-party claims against the RTC, asserting that it was responsible for alleged damages incurred during its management of Home Savings and that it had an obligation to indemnify them.[2]

In an attempt to prevent the RTC from removing the entire case, petitioner asked the Kansas state judge, in a highly irregular *ex parte* proceeding, to sever the third-party claims from the rest of the case. The Kansas state judge acquiesced, stating:

> The Court is familiar with the history of this case, [and] feels that under the circumstances the addition of the Resolution Trust Corporation . . . by the third-party petition would subject this case to removal under the federal statutes. . . . [T]he Court [does] not feel that . . . to maintain [the third-party claims] in the same case [as the principal claims] and subjecting [the entire] case to removal would be in the best interests of the advancement of the princip[al] case. . . . I . . . sign ex parte the order to sever and direct . . . that the third party claim be severed and filed . . . as a separate case entirely from the previous [case]. . . . [T]he Court considers this matter on an emergency basis.

KPERS I, 4 F.3d at 616-17 (alterations in *KPERS I*).[3]

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[2] The RTC conceded that the claims against it were "not frivolous," and the Eighth Circuit agreed. *KPERS I*, 4 F.3d at 621-22.

[3] The Kansas state judge was subsequently disqualified for personal bias from all litigation involving petitioner due in part to his pre-removal actions in this case.

The RTC removed the case to federal court in Kansas City, Missouri, the location of Home Savings, under 12 U.S.C. § 1441a(*l*)(3). The district court ruled that the Kansas state judge's *ex parte* severance order violated the Supremacy Clause and was therefore ineffective to deprive the RTC of its right to remove the "entire case" under § 1441a(*l*)(3). The Eighth Circuit, in a ruling not challenged here, affirmed the initial removal to federal court. *KPERS I*, 4 F.3d at 622, *cert. denied*, 511 U.S. 1126 (1994). Ultimately, the third-party claims against the RTC were dismissed,[4] but the district court exercised its discretion to retain the case based on the factors of judicial economy[5] and fairness to the parties[6] set forth in

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[4] Petitioner's representation that after the claims against it were dismissed, the RTC had "informed the district court that it had no furher interest in the case remaining in federal court" (Pet., p. 5 n.6), is grossly misleading. The RTC has been continually involved in this case to ensure that the claims being asserted by petitioner against certain defendants were not derivative claims that rightly belonged to the RTC as receiver of a failed savings and loan. In fact, as noted above, the RTC itself moved to intervene in the case long before it was served with the third-party complaint. After the district court dismissed the third-party complaint against the RTC, it granted the RTC's motion for status as a limited intervenor. Thus, the RTC remained involved in the case after the dismissal of the third-party complaint against it, and it even attended depositions and hearings to protect its interests.

[5] As of June 30, 1994, *before* the Eighth Circuit's decision in *KPERS III* that engendered the majority of petitioner's abusive litigation tactics designed to delay or prevent implementation of that decision, the district court "had already spent more time on this case than any other case but one in 10 years." *KPERS V*, 85 F.3d at 1355.

[6] The district court's fairness concerns were based on the fact that all Kansas judges are beneficiaries of petitioner and on the unusual circumstances surrounding the state court judge's after-hours, *ex parte* severance of the claim against the RTC:

> My concern about fairness focuses on the appearances generated by the obvious benefit to any member of KPERS, including the Kansas judges, who could receive increased benefits if KPERS

28 U.S.C. § 1367. The Eighth Circuit affirmed, holding that once the RTC becomes a party to a case, under 12 U.S.C. § 1441a(*l*)(1), "the entire action is 'deemed to arise under the laws of the United States' and is within the original jurisdiction of the district court." *KPERS IV*, 77 F.3d at 1067.

2. During the pendency of this case, the Home Savings defendants raised the statute of limitations as a defense. In response, the Kansas legislature enacted a new ten-year statute of limitations applicable only to actions brought on behalf of petitioner. KAN. STAT. ANN. § 60-522 (1992). When the Home Savings defendants moved for summary judgment, arguing that the new ten-year statute did not apply because the legislature had not expressed an intent to revive barred actions, the legislature amended the statute to add a new section purporting to make the statute retroactive. *See KPERS III*, 61 F.3d at 614.

The Home Savings defendants' summary judgment motions based on the statute of limitations presented the district court with two important preliminary questions: (1) whether the RTC removal statute, 12 U.S.C. § 1441a(*l*)(3), which allowed the RTC to remove the case from Kansas state court to federal court in Missouri, would change the applicable limitations law from Kansas to Missouri, and (2) whether the Kansas legislature's passage of the KPERS-specific, ten-year statute of limitations would, under Kansas law, apply retroactively only to claims not yet time-barred or would also revive already time-

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is successful in this case. Furthermore, as I stated at the Ju[ne] 30, 1994, hearing, the Shawnee County District judge's participation in KPERS' ex parte efforts to thwart the RTC's removal rights "creates a reasonable concern about the manner in which the parties to this case might be treated if [the case] is returned to . . . Shawnee County." Tr. 199. All of the parties in this case deserve a forum for the resolution of their dispute free of these influences.

(Peat Marwick's *KPERS IV* Appendix in the Eighth Circuit, p. 39.)

barred claims. In answering the first question, the district court analogized the situation in this case to a transfer case under 28 U.S.C. § 1404(a), and therefore decided to apply Kansas's limitations law. The district court then determined that petitioner was subject to a statute of limitations under Kansas law. Finally, the district court denied the motions, holding that petitioner's claims were revived by the special ten-year statute of limitations. The Home Savings defendants appealed.

On appeal, petitioner argued to the Eighth Circuit that, under Kansas law, the KPERS-specific, ten-year statute of limitations effectively *lengthened,* retroactively, the statute of limitations applicable to its claims here. *KPERS III*, 61 F.3d at 614. Petitioner never suggested to the Eighth Circuit that, prior to passage of the ten-year statute, its claims were not subject to any statute of limitations. Nor did petitioner ask the Eighth Circuit to certify the statute of limitations question to the Kansas Supreme Court.

The Eighth Circuit held that under the RTC removal statute, the district court should apply the law of the forum, *i.e.*, Missouri law. *Id.* The Eighth Circuit then held that Missouri would borrow the Kansas statute of limitations if it were shorter than Missouri's and if it would fully bar petitioner's claims. *Id.* Turning to the applicability of the KPERS-specific, ten-year statute of limitations, the Eighth Circuit held that under clear authority from the Kansas Supreme Court, the statute did not revive time-barred claims. *Id.* at 615. Accordingly, the Eighth Circuit held that the statute did not apply to petitioner's claims. *Id.* Rather, it held, "the Missouri borrowing statute requires the district court to apply the Kansas two- and three-year statutes to KPERS' claims if the claims would be 'fully barred' by these statutes (a finding of fact which has not been made)." *Id.* The *KPERS III* mandate specifically directed the district court to make that finding of fact and to "determine whether KPERS'

claims are time-barred under the applicable Kansas statutes." *Id.* at 616.

In its petition for rehearing of *KPERS III*, petitioner for the first time asked the Eighth Circuit to certify a question to the Kansas Supreme Court, but *not* the question that it now argues the Eighth Circuit should have certified. Petitioner did not argue, as it does now in this Court, that its claims had not been subject to any statute of limitations prior to the passage of the ten-year statute, but instead argued that the Eighth Circuit had misinterpreted the effectiveness of the ten-year statute to *extend* the period of limitations applicable to its claims. Subsequently, when it petitioned this Court for a writ of certiorari, the issue petitioner presented was whether there was a "retroactive *lengthening* of the statute of limitations" (emphasis added). At that time, petitioner did not argue to this Court that its claims had been subject to no statute of limitations before the passage of the ten-year statute, nor did it argue that the Eighth Circuit had erred by failing to certify questions to the Kansas Supreme Court.

3. Petitioner responded to the Eighth Circuit's decision in *KPERS III*—the factual application of which would almost certainly defeat petitioner's claims—by embarking upon what the Eighth Circuit has held was "a strategic and tactical plan to delay and prevent the district court from ruling on [respondents'] summary judgment motions." *KPERS V*, 85 F.3d at 1359. Petitioner "undertook a flurry of actions which occupied the district court's time to the detriment of the efficient resolution of this case." *Id.* Thus, petitioner filed a series of duplicative motions asking the district court to revisit prior holdings. For example, petitioner filed a second "renewed" motion to remand this case to state court, which sought to have the district court reconsider both the *KPERS I* decision that the case had been properly removed and the district court's June 30, 1994, decision not to remand after dis-

missing the claims against the RTC. After analyzing the applicable precedent, the district court again rejected petitioner's arguments and denied the motion to remand, noting that "[s]ince the Eighth Circuit Court of Appeals' decision on July 27, 1995, [petitioner] has taken a number of steps, including the filing of this motion [to remand], to delay the expeditious resolution of this case." *KPERS V*, 85 F.3d at 1359 (quoting the district court).

Two days before the scheduled hearing on its second renewed motion to remand, petitioner moved to disqualify the district court and moved to stay all proceedings pending disposition of that motion. After extensive further briefing and hearings, the district court denied the motion to disqualify. In denying petitioner's subsequent petition for a writ of mandamus seeking disqualification of the district court judge, the Eighth Circuit concluded that "[o]ur review of [petitioner's] pattern of conduct leads us to the conclusion that the defendants' allegation that [petitioner's] recusal motion and this [mandamus] petition were filed for tactical and strategic reasons, as opposed to concern about the impartiality of the trial judge, is correct." *Id.* at 1360.

As part of its campaign to circumvent the Eighth Circuit's decision, on August 23, 1995, petitioner filed two separate actions in Shawnee County, Kansas, seeking the same relief from the same defendants based on the same facts alleged in the case pending before the federal district court.[7] Lead trial counsel for petitioner proclaimed to the press that petitioner filed the duplicative actions because

[7] Petitioner's suggestion that it sought permission to file the separate state-court actions before doing so (Pet. 5 n.6) is untrue. In fact, the district court ultimately awarded Peat Marwick and others attorneys' fees and costs incurred in obtaining an injunction against the prosecution of the duplicative actions under 28 U.S.C. § 1927, finding that petitioner had "acted with objectively unreasonable behavior and bad faith when it brought suit . . . in Kansas state court." (Petitioner's *KPERS VII* Addendum in the Eighth Circuit, p. 3.)

of "a multitude of problems and issues that are causing delays in federal court, coupled with what we think is an erroneous decision by the 8th Circuit in interpreting the Kansas statute of limitations." *KPERS IV*, 77 F.3d at 1066. The Eighth Circuit found that "the effect of the Kansas lawsuits [was] to subvert the district court's removal jurisdiction." *Id.* at 1065. Accordingly, it affirmed the district court's entry of a preliminary injunction against duplicative state-court actions. *Id.* at 1071, *cert. denied*, 117 S. Ct. 359 (1996).[8]

4. Ultimately, despite petitioner's obstructionist tactics, the district court held hearings on defendants-respondents' motions for summary judgment, followed the dictates of the Eighth Circuit concerning the applicable law, and, applying it in a straightforward manner to the factual record fully developed after the depositions of approximately 60 fact witnesses and the exchange of approximately 20 expert reports, granted summary judgment to the defendants on the ground that petitioner's claims were time-barred. (App. 78a, 97a, 98a, 100a.)

In the decision below, the Eighth Circuit affirmed the district court's straightforward factual application of *KPERS III*. Indeed, petitioner only halfheartedly argued that its claims were not barred by the undisputed facts. Instead, petitioner focused its energies on rearguing the limitations questions decided by the Eighth Circuit in *KPERS III*, and again sought to have the Eighth Circuit certify a statute of limitations issue to the Kansas Supreme Court, albeit a different issue than it had presented in its rehearing petition in *KPERS III*. Noting that the certification request came too late, the Eighth Circuit declined to certify the statute of limitations issue to the Kansas Supreme Court:

> In *KPERS III* we decided that the Missouri borrowing statute required the application of the Kansas

[8] That injunction has since been made permanent. (*See* App. 23a.) Petitioner does not seek review of it here.

> two- and three-year statutes of limitation. KPERS's petitions for rehearing en banc and for certiorari were denied. Our ruling in *KPERS III* is the law of the case, and we reject the suggestion that these issues be certified to another tribunal.

(App. 13a.) "[S]atisfied that the law of the case doctrine prevents [petitioner] from relitigating the issue of whether these statutes [of limitations] apply to its claims," the Eighth Circuit also declined to revisit its prior holdings. (*Id.*) Nevertheless, relying on two Kansas Supreme Court cases directly on point, the Eighth Circuit addressed and rejected petitioner's argument that it was not subject to any statute of limitations. (App. 13a-15a.) Thereafter, the Eighth Circuit denied petitioner's petition for rehearing and suggestion for rehearing *en banc*. (App. 24a.)

After the Eighth Circuit issued the decision below, the Kansas Supreme Court, in other litigation to which petitioner is a party,[9] decided that the special ten-year statute of limitations revives already time-barred claims brought on behalf of petitioner. *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321 (Kan. 1997). Because the Eighth Circuit's *KPERS III* decision that the ten-year statute was ineffective to revive already barred claims was based on clear Kansas authority, petitioner had followed a different approach in the Kansas state courts. There, petitioner argued that it had never been subject to any statute of limitations until the legislature passed the new ten-year statute. Notwithstanding the clear evidence that the statute was enacted to lengthen the existing period of repose (as petitioner had previously argued to the Eighth Circuit and to this Court), the Kansas Supreme Court, purporting to rely on the very same cases as the Eighth Circuit did in rejecting petitioner's argument, accepted petitioner's argument. In doing so, the Kansas Supreme Court did not overturn any prior Kansas precedent.

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[9] Respondent Peat Marwick is not a party to the cases in Kansas state court that generated this recent opinion.

REASONS FOR DENYING THE PETITION

This petition presents no questions worthy of this Court's attention. The first question seeks an advisory opinion only. The second question seeks a GVR order without meeting any of this Court's requirements for issuing such an order. Finally, granting petitioner relief at this stage would serve only to reward its abusive and manipulative litigation tactics.

1. The first question—which seeks to have this Court create a new rule of law *requiring* that a federal court certify an issue to a state court or at least stay its hand pending the state court's consideration of the issue—cannot properly be decided in the context of this case because the Kansas Supreme Court has already rendered its decision. On remand, therefore, there could be no call for the Eighth Circuit to certify any question to the Kansas Supreme Court or to stay its hand pending a decision by that court. Thus, the petition seeks an advisory opinion only. It is well established, however, that this Court does not render advisory opinions. *E.g., Trailmobile Co. v. Whirls,* 331 U.S. 40, 48 (1947).

Even if it had not been mooted by the Kansas Supreme Court's decision, the first question still would not be worthy of this Court's attention. This Court has made clear that whether to certify a question in a given case "rests in the sound discretion of the federal court." *Lehman Bros. v. Schein,* 416 U.S. 386, 391 (1974). Petitioner proposes to make certification non-discretionary, at least where a state agency is one of the parties. Petitioner thus seeks to make certification "obligatory"—something this Court has specifically refused to do. *Id.* at 390; *see also id.* at 394 (Rehnquist, J., concurring) ("I assume it would be unthinkable to any of the Members of this Court to prescribe the process by which a district court or a court of appeals should go about researching a point of state law."). Beyond its unhappiness with the Eighth Circuit's decision below, petitioner offers no reason

for this Court to change the rule of law applicable to certification.[10]

Moreover, the Eighth Circuit did not abuse its discretion in declining to certify the statute of limitations issue or to stay its hand. First, the Eighth Circuit had already decided the statute of limitations issue in *KPERS III*, where petitioner did not seek certification and where petitioner took positions inconsistent with its position in the most recent argument to the Eighth Circuit.[11] In the decision below, the Eighth Circuit relied on *KPERS III* in refusing to certify: "Our ruling in *KPERS III* is the law of the case, and we reject the suggestion that these issues be certified to another tribunal." (App. 15a.) Second, certification is appropriate where a case presents "novel or unsettled questions of state law," and especially where certification might allow a constitutional challenge

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[10] Where warranted, the courts of appeals, including the Eighth Circuit, routinely certify issues to the state supreme courts. *E.g.*, *Kulinski v. Medtronic Bio-Medicus, Inc.*, 112 F.3d 368, 370 (8th Cir. 1997) (certifying question to Minnesota Supreme Court). Requiring that they do so where a state court has a particular issue under consideration—and where there can be no guarantee the state court will actually address the issue—would require already overburdened federal courts to evaluate a state court's docket before ruling on any particular issue. Removal of the courts of appeals' discretion to weigh such factors as the relative efficiency of certification, their familiarity with the issue before them, and whether one party to an appeal had engaged in abusive litigation tactics in order to manufacture an apparent need for certification, would inappropriately restrict those courts in their ability to manage their extensive dockets.

[11] In *KPERS III*, petitioner argued that the ten-year statute of limitations *extended* the period in which it had to file suit. In the most recent argument below, however, petitioner took the exact opposite position, arguing that it had never been subject to any statute of limitations until the ten-year statute was passed. Even in its rehearing petition in *KPERS III*, in which petitioner first sought certification to the Kansas Supreme Court, petitioner did not seek to have the question whether it was subject to any statute of limitations certified. Notably, petitioner did not complain about the failure to certify in its *KPERS III* petition for a writ of certiorari.

to be avoided. *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1073-74 (1997). This case did not present novel or unsettled questions of law, as there was Kansas Supreme Court authority directly addressing the applicability of the statute of limitations to petitioner (on which the Kansas Supreme Court itself relied in its decision), and the Eighth Circuit did not invalidate a state statute on constitutional grounds. Rather, this case involved the straightforward application of state statute of limitations law to state tort claims—a task which federal courts routinely manage.[12] Third, petitioner had engaged in abusive and manipulative litigation tactics throughout this case, both to avoid federal jurisdiction and to evade the Eighth Circuit's decision in *KPERS III*, manifestly increasing the cost of this case both to the federal judiciary and to respondents. *See supra*, pp. 10-12. These are all factors that the Eighth Circuit could properly consider in exercising its discretion to deny certification.

Finally, the highly unusual history and procedural posture of this case make it a particularly inappropriate case in which to attempt to establish a rule of general applicability. First, the RTC's involvement in this case is critical, because that involvement converted this case into a federal-question case under 12 U.S.C. § 1441a(*l*)(1). Such circumstances are unlikely to recur, given that the RTC ceased to exist as of December 1995. *See* 12 U.S.C. § 1441a(m). Second, as a matter of federal law under *KPERS III*, the governing limitations law is that of the forum—Missouri—including its borrowing statute. Kansas law is relevant only to the extent borrowed by Missouri.

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[12] *See, e.g., Guaranty Trust Co. v. York*, 326 U.S. 99, 110-12 (1945) (in diversity cases, forum state's limitations law governs); *Cope v. Anderson*, 331 U.S. 461, 463 (1947) (applying borrowing statutes of forum state leads to ultimate application of statute from state where cause accrued). Moreover, the "very essence of the *Erie* doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge." *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991).

Third, this case has had so many interlocutory appeals that the Eighth Circuit was unusually familiar with the facts, the law, and the parties' litigation tactics when it exercised its discretion not to certify the question requested by petitioner.[13] Fourth, petitioner took inconsistent positions during interlocutory appeals both in the Eighth Circuit and in this Court both on the merits of the issue it sought to have certified and on the question it now asserts the Eighth Circuit was required to have certified; in addition, the courts below have specifically found that petitioner has engaged in improper litigation tactics for the very purpose of delaying entry of final judgment in federal court in order to create the apparent conflict which petitioner now contends required certification. For all of these reasons, it would be difficult in this case to craft a useful rule of general applicability, and any rule created here would necessarily have little precedential value.

2. This Court's discretionary GVR power "should be exercised sparingly." *Lawrence v. Chater*, 116 S. Ct. 604, 609 (1996) (*per curiam*). Under this Court's caselaw, a GVR order should be considered only where intervening developments that were not fully considered below (1) reveal a reasonable probability that the decision below rests on a premise that the court below would now reject, and (2) if applied, will determine the ultimate outcome of the litigation. *Id.* at 607. Neither of those requirements is met in this case.

First, there is no reasonable probability that the Eighth Circuit's decision rests on a premise that the Eighth Circuit would now reject. As noted above, because of the large number of interlocutory appeals, the Eighth Circuit had great familiarity with this case. The Eighth Circuit understood well the unique circumstances presented by this

[13] The decision below represents the seventh unanimous decision rendered by the Eighth Circuit in this case. Two of the three panelists below had also sat on the other six *KPERS* panels, and the third panelist had sat on two other *KPERS* panels.

case, including the removal to federal court in Missouri pursuant to the RTC removal statute, 12 U.S.C. § 1441a(*l*)(3), the fact that this case turns on the application of Missouri law, the fact that the statute of limitations issue was already decided in *KPERS III*, and the various positions advanced by petitioner. Before rendering its decision below, the Eighth Circuit was not only fully advised of the pendency of the Kansas Supreme Court case, but also of the reasons why resolution of the issues pending before that court would make no difference to the ultimate outcome of this case. The fact that the court below decided this case without waiting for the Kansas Supreme Court's decision is a result of the Eighth Circuit's conclusion that the Kansas court's decision would not be outcome-determinative of this case. After the Kansas Supreme Court's decision, the Eighth Circuit was provided with a copy of the Kansas Supreme Court's decision, and thus had the opportunity to consider whether vacating the decision below was appropriate. The Eighth Circuit chose not to do so.

The Eighth Circuit, of course, had decided the statute of limitations question in *KPERS III*. At that stage, petitioner effectively conceded that it was subject to *some* statute of limitations, arguing that the new ten-year statute *lengthened* the time in which it had to sue. The Eighth Circuit's straightforward decision that the legislature had not revived petitioner's claims, which was based squarely on Kansas Supreme Court authority,[14] thus became the law of the case.

In the proceedings below, petitioner attempted to litigate the statute of limitations question anew, without regard to the fact that the Eighth Circuit had already decided the issue in *KPERS III*. Petitioner argued—in direct opposition to its arguments to the Eighth Circuit in *KPERS III* and in its corresponding petition for certiorari to this Court—that it was not subject to *any* statute of

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[14] *Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958 (Kan. 1992).

limitations until the legislature passed the ten-year statute. "[S]atisfied that the law of the case doctrine prevents [petitioner] from relitigating the issue of whether these statutes [of limitations] apply to its claims," the Eighth Circuit rejected petitioner's attempt to revisit that issue in the decision below. (App. 13a.)

Nor did the Kansas Supreme Court's decision overrule any of the cases on which the Eighth Circuit relied, either in *KPERS III* or in the decision below. *Compare Lords Landing Village Condominium Council v. Continental Ins. Co.*, 117 S. Ct. 1731, 1732 (1997) (*per curiam*) (GVR order entered because "[t]he Maryland Court of Appeals also expressly disapproved [the] two decisions on which the Court of Appeals had primarily relied"). Rather, the Kansas Supreme Court simply accepted the second of the two inconsistent approaches petitioner had presented to the Eighth Circuit. *Cf. Department of the Interior v. South Dakota*, 117 S. Ct. 286, 287 (1996) (Scalia, J., dissenting) ("But we have never before GVR'd simply because the Government, having lost below, wishes to try out a new legal position. The unfairness of such a practice to the litigant who prevailed in the Court of Appeals is obvious. ('Heads I win big,' says the Government; 'tails we come back down and litigate again on the basis of a more moderate Government theory.')"). Under these circumstances, there is no reason to believe that the Eighth Circuit would now reject any premise on which its decision was based.

Second, the Kansas Supreme Court's decision would not determine the ultimate outcome of this litigation. A remand would not result in the application of now-clarified Kansas law. Rather, it would result in the application of Missouri law, because the Missouri borrowing statute comes into play only when another state's limitations period is shorter than Missouri's. *KPERS III*, 61 F.3d at 614. Nor would a remand change the disposition. The Eighth Circuit, applying Missouri law, would still affirm

the district court's grant of summary judgment to respondents on statute of limitations grounds.[15] Moreover, as to Peat Marwick, summary judgment would likely also be affirmed on the alternative ground (presented to both the district court and the Eighth Circuit) that any alleged negligence by Peat Marwick did not cause petitioner to suffer any damages.[16]

Finally, this Court has made clear that "if it appears that the intervening development . . . is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Lawrence*, 116 S. Ct. at 607. A GVR order would be inappropriate here for both of these reasons. Remanding this case would inappropriately reward petitioner's abusive and manipulative litigation strategies, which have already been extremely costly to the federal courts. In addition, any benefits from a remand would clearly be outweighed by the

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[15] The district court found that petitioner had notice of its claim more than five years before it sued respondents (App. 58a-61a), thus rendering petitioner's claims time-barred under the Missouri five-year period.

[16] The very same facts that the district court found were undisputed and that cause petitioner's claims to be barred under the two-year statute of limitations compel a finding that nothing Peat Marwick did caused petitioner to suffer any of its alleged losses. Petitioner claims that it suffered losses because it continued to make direct placement investments as a result of Peat Marwick's alleged failure to report that investments in petitioner's portfolio had suffered permanent impairment as of June 30, 1988. The undisputed facts, however, show that petitioner was on notice of the purported fraud with respect to those investments in December 1986 and took no action. (App. 36a-44a.) The undisputed facts also show that petitioner had knowledge of at least $51 million of permanent impairment in its private placement investment portfolio by September 1989, yet it took no action to stop its direct placement investments. (Petitioner's Appendix in the Eighth Circuit, p. 2232.)

substantial costs involved in having the Eighth Circuit consider this case for a ninth time.[17]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[17] As Chief Justice Rehnquist has observed, "requiring the Court of Appeals to delve into the facts and law of [a] case again, months after it denied rehearing, is not without cost. The typical active judge of the Court of Appeals for the Eleventh Circuit participates in somewhere between 150 and 200 panel decisions each year. For us to require a busy court to once more revisit the merits of this state law dispute gives these petitioners more of the time and resources of the federal judicial system than they deserve." *Thomas v. American Home Prods., Inc.*, 117 S. Ct. 282, 285 (1996) (Rehnquist, C.J., dissenting from GVR order).

(6)

No. 97-471

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1997

KANSAS PUBLIC EMPLOYEES
RETIREMENT SYSTEM,

Petitioner,

v.

BLACKWELL, SANDERS, MATHENY, WEARY
& LOMBARDI, L.C., A LAW PARTNERSHIP, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The fusillade of misleading and irrelevant points launched by respondents in their four briefs in opposition — covering a total of 87 pages — cannot, despite respondents' best efforts, obscure the two independent grounds for review set out in the petition for certiorari.

First, the error committed by the Eighth Circuit in failing to certify, or at least stay, a decision with respect to the controlling issue of Kansas law warrants plenary review because it constitutes a violation of basic principles of cooperative judicial federalism.

Second, even if this Court is unwilling to grant plenary review, the error below — an error that has subjected the parties and this Court to the unnecessary burden of the certiorari process — can be fully remedied simply by resort to this Court's longstanding practice in like circumstances of vacating the court of appeals' decision and remanding for reconsideration in light of the intervening decision of a state supreme court on a controlling point of law.

1. With respect to the first question presented (Pet. 12-17), respondents' submissions are more notable for what they do not say than what they do say. Respondents do not contest the importance that has long been placed by this Court, in its encouragement of cooperative judicial federalism, on the exercise of "sound discretion" in deciding whether to use available certification procedures to resolve uncertain issues of state law. *See* Pet. 13-14; *Lehman Bros. v. Schein*, 416 U.S. 396, 391 (1974).[1] The requirement of "sound discretion" must necessarily carry *some* constraining effect — "there is obviously a difference between *principled* and *limitless* discretion," Pet. 14, even within the rule that mere "doubt as to local law" does not, in general, make certification "obligatory." *Lehman*, 416 U.S. at 390-91.[2]

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[1] Indeed, one respondent affirmatively endorses this point. *See* Brief in Opposition of Respondent Shook, Hardy & Bacon ("Shook Hardy Opp.") at 17-19.

[2] Amazingly, two respondents actually argue (unsupported by any authority) that "[c]ertification of state law questions should *never* be mandatory." Brief in Opposition of Respondents Dreiseszun, Ozar and the Estate of Frank S. Morgan ("Dreiseszun Opp.") at 12 (emphasis added). Other respondents invoke the concurring opinion in *Lehman* of then-Justice (now Chief Justice) Rehnquist (*see* Brief in Opposition of Respondents KPMG Peat Marwick LLP and Robert W.L. Spence ("KPMG Opp.") at 14; Shook Hardy Opp. 18), but ignore the key language

Nor do respondents make any serious effort to dispute the analysis of a number of leading jurists, including Judges Becker, Easterbrook, Sloviter, and Calabresi, pointing to the strong need for certification of uncertain state-law issues to prevent grave errors with respect to the content of state law and to eliminate the real danger that, absent the use of certification in such cases, many important issues of state law will be funneled into the federal system as a result of forum-shopping. Pet. 14-16. Finally, respondents do not dispute that, in the more than two decades that have passed since this Court's 1974 decision in *Lehman Bros.*, clear differences have emerged in the test used for certification by the lower courts. Pet. 16 & n.22.

Thus, the first question presented, allowing further explication of the role of certification as an aspect of judicial federalism, is plainly an appropriate subject for plenary review. Further, the rule or guideline that we have proposed, defining one instance — admittedly narrow — in which a federal court categorically exceeds its discretion by refusing to certify, is well crafted to an agenda of cautious further explication. If this Court's decision in *Lehman* has any binding force, it must mean that when: (1) a federal court is hearing the claims of *a State itself*, involving important state interests, and (2) those claims turn on an uncertain issue of *that State's own law*, and (3) the issue is one on which the State's supreme court has already granted discretionary review, then (4) the federal court must certify the issue (or, at minimum, temporarily stay its hand).

Respondents seek to avoid the force of this argument by suggesting that this case is a poor vehicle for review and, in particular, that the proposed rule or guideline would not benefit KPERS. Here, respondents advance four main arguments. All are without merit.

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of that concurrence quoted in our petition, Pet. 14 n.19, which appears consistent with our narrow approach. Further, respondents ignore a key reason why, in the *Lehman* concurrence, the Chief Justice counseled caution: *Lehman* was "the first time" that the Court "expressed its view as to the use of certification procedures by the federal courts," 416 U.S. at 395, leading him to conclude that "a sensible respect for the experience and competence of the various integral parts of the federal judicial system suggests that we go slowly" with respect to the use of certification procedures. *Id.* at 393. The experience with certification over the 23 years since *Lehman* has laid the groundwork for taking further steps — especially in light of divisions that currently exist in the lower courts, and in light of recent expressions of concern by leading jurists. See p. 2, *infra*.

First, respondents claim that it is too late for KPERS to benefit from a ruling on the first question presented because "the Kansas Supreme Court has already rendered its decision." KPMG Opp. 14. Thus, we are told, on remand "there could be no call for the Eighth Circuit to certify any question to the Kansas Supreme Court or to stay its hand pending a decision by that court." *Id.* The answer to KPMG's argument is obvious: if this Court grants plenary review and holds that the Eighth Circuit erred in not *earlier* deferring to the Kansas Supreme Court on a controlling issue of state law, that error can be fully rectified by requiring the Eighth Circuit to *now* defer to the Kansas Supreme Court's already announced decision — i.e., by following that decision on remand.[3]

Second, respondents suggest that KPERS somehow waived its right to a ruling from the Eighth Circuit on the central issue of the nature of KPERS' investment functions (governmental or proprietary), by not appealing it sooner. *See* KPMG Opp. 15 & n.11; Brief of Respondent Blackwell Sanders Matheny Weary & Lombardi, L.L.P., in Opposition ("Blackwell Sanders Opp.") at 14-15. But as our petition established, KPERS appealed the district court's ruling on this issue as soon as a final judgment was entered in the case. *See* Pet 6 n.8. That a few *respondents* had earlier pursued an *interlocutory* appeal contesting some statute-of-limitations rulings of the district court premised on KPERS' activities being proprietary in nature, did not obligate KPERS to bring its *own* motion for interlocutory review or to otherwise raise the issue — especially since the district court had concluded that all of KPERS' claims *were* timely (under the Kansas 10-year special limitations statute for claims brought by KPERS).[4]

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[3] Despite some efforts by respondents to obfuscate the point, the Kansas Supreme Court decision that KPERS' lawsuits relate to a governmental and not a proprietary function was the key to its determination that the Eighth Circuit had erred in applying the Kansas two- and three-year limitations periods. *See* Pet. 10-11; *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321, 1328 (Kan. 1997) ("fundamental issue we must decide"); *id.* at 1338 ("this important issue was not even mentioned" in earlier Eighth Circuit statute-of-limitations decision); *id.* at 1341 (Eighth Circuit's recent decision "failed to recognize" key distinction in Kansas law); *id.* at 1343 (Eighth Circuit's recent decision was "incorrectly decided" because KPERS' actions "are all governmental in character" within meaning of Kansas law).

[4] Indeed, as those respondents made clear from the outset, that interlocutory appeal focused on a choice-of-law issue. *See* Petition for Permission to Appeal of Estate of Frank Morgan, et al. (No. 94-8088), July 14, 1994, at 1

Third, respondents assert that, at the time the Eighth Circuit ruled, *no* uncertainty existed under Kansas law on the governmental/proprietary issue. *See* KPMG Opp. 15-16; Shook Hardy Opp. 20-22; Blackwell Sanders Opp. 11 & n.9. But respondents ignore the fact that *they themselves* admitted in filings with the Kansas courts, in which they sought review on this very issue, that the issue was extremely uncertain. *See* Pet. 8-9 (quoting Reply Brief of Appellant at 2). For example, although respondent Blackwell Sanders asserts in this Court that "it is misleading at best for KPERS to characterize the issue . . . as an issue of 'first impression'" (Backwell Sanders Opp. 11), Blackwell Sanders argued in the Kansas courts that there were "substantial differences of opinion" on the issue.[5] Likewise, another group of respondents told the Kansas courts that "[t]here are *no cases* directly considering whether KPERS is exercising a governmental or a proprietary function when investing and administering fund assets."[6]

In any event, the fact that the Kansas Supreme Court *agreed* with these respondents, and with other defendants in the Kansas courts, that the issue was uncertain enough to merit immediate discretionary and plenary review (before the Eighth Circuit took up the present case) demonstrates its unsettled nature when the Eighth Circuit ruled.

Fourth and finally, respondents make various assertions that even if plenary review would otherwise be warranted on the first question presented, it should be denied here because KPERS supposedly is guilty of "engag[ing] in improper litigation tactics for the very purpose of delaying entry of final judgment in federal court in order

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("Because of the removal to a different states, the primary question in this petition is whether to apply the Missouri limitations law . . . or Kansas limitations law"). Just one paragraph of the thirteen-page petition discussed the substance of Kansas limitations law. *Id.* at 9-10. The district court's governmental/proprietary ruling under Kansas law was never addressed at any point during that interlocutory appeal.

On the basis of KPERS' showing in the instant case below that it was not required in respondents' earlier interlocutory appeal to present all alternative arguments with respect to the substance of Kansas limitations law (*see* Reply Brief of Appellant (No. 96-3680), Jan. 28, 1997, at 7-9), the Eighth Circuit went on to decide the governmental/proprietary issue, declining to rely on the "law of the case" doctrine to avoid the merits, and thereby demonstrating the irrelevance of respondents' point. *See* Pet. App. 13a-15a.

[5] Reply Brief of Appellant, Supp. App. at 6.

[6] *Id.*, Supp. App. at 4 (emphasis added) (Reimer & Koger respondents).

to create the apparent conflict which petitioner now contends required certification." KPMG Opp. 17. In particular, respondents accuse KPERS of "embark[ing] on a series of abusive tactics intended to delay dismissal while it set up the limitations question in the other state court cases it had filed." Dreiseszun Opp. 6; *see also id.* at 7.

This claim makes no sense. To be sure, given that this case was removed to Missouri federal court only as a result of an unusual forum-shopping tactic pursued by respondents, who brought meritless claims against the RTC, and given that the RTC stated on the record that, once dismissed from the suit, it had no interest in the case's remaining in federal court, KPERS sought to return the litigation to the Kansas state courts, where *all the other consolidated cases involving its investments are pending*. *See* Pet. 4-5 n.6.[7] The State of Kansas obviously had every reason, and every right, to attempt to consolidate all the cases involving KPERS' investments in its own courts. When these efforts failed, KPERS sought to obtain certification to the Kansas Supreme Court of the Kansas state-law issue.

Thus, the definitive answer to respondents' charge is that any delay resulting from various motions and appeals could not have been part of a scheme by KPERS to "set up" a countervailing Kansas Supreme Court decision on the limitations issue. KPERS *won* in the Kansas trial court on that issue. The issue reached the Kansas Supreme Court only because *respondents*, and other defendants in the state court litigation, sought review. The pendency of that issue

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[7] KPMG accuses us of making a "grossly misleading" misrepresentation of the RTC's position on this point. KPMG Opp. 7 n.4. KPMG provides no relevant explanation of the basis for this accusation; the balance of this footnote simply observes that the RTC monitored the case for a time after the claims against it were dismissed as meritless, but fails to take account of the RTC's explicit assumption that the case would be returned to state court. So that this Court can evaluate KPMG's accusation for itself, we have appended the entire passage from the hearing transcript in which the RTC expressed its views. See Appendix hereto.

In a related vein, KPMG intimates that KPERS sought to have this case heard in the Kansas state courts because the judges there are biased, as a win by KPERS supposedly might increase their pensions. KPMG Opp. 7-8 n.6. But KPERS administers *defined benefit* plans, so that the effect of a KPERS' loss and consequent shortfall would be a slight increase in the tax burden for all Kansas citizens, including federal judges residing in Kansas. *See* Brief of Appellants at 33-34. In addition, the acknowledged history of the Kansas state court litigation demonstrates the willingness of the Kansas judiciary to act on claims of judicial bias. *See* KPMG Opp. 6 n.3; Blackwell Sanders Opp. 7-8 n.7.

before the Kansas Supreme Court — which, we contend, triggered the obligation to certify, or at least to wait — was not the endgame of some nefarious delay stratagem by KPERS. Respondents' assertion of an "unclean hands" theory is entirely beyond the pale.[8]

2. We explained in the petition that, if this Court were not inclined to grant plenary review in this case in order to provide guidance on issues of judicial federalism, then it should at the very least grant the petition, vacate the judgment, and remand to the Eighth Circuit for further consideration in light of the Kansas Supreme Court's intervening decision. *See* Pet. 18-21. As with the first question presented, here again respondents do not dispute the essential points, instead relying on an effort to obfuscate the basis for a GVR order by reference to aspects of the record that are irrelevant here, and are appropriate only for consideration by the Eighth Circuit on remand.

The most striking aspect of the oppositions lies with respondents' failure to confront the decisions handed down by this Court more than half a century ago in *Vandenbark v. Owen-Illinois Glass Co.*, 311 U.S. 538 (1941), and *Huddleston v. Dwyer*, 322 US. 232 (1944). *See* Pet. 19 & n.25. KPERS heavily emphasized these cases in its briefs filed with the Eighth Circuit urging rehearing.[9] Under *Vandenbark*, the Eighth Circuit was obligated to conform its decision to an intervening decision of the Kansas Supreme Court, and this duty persisted "until such time as [the federal] case is no longer *sub judice*." 311 U.S. at 543. As we emphasized to the Eighth Circuit, when a lower federal court refuses even to *consider* the intervening state court decision, this Court will grant, vacate, and remand, to ensure that the court of appeals discharges its duty under *Vanderbark*. *See, e.g.*, *Huddleston*; *National Union Fire Ins. Co. v. American Medical International, Inc.*, 116 S. Ct. 510 (1995); *Exxon Co., U.S.A. v. Banque de Paris et des Pays-Bas*, 488 U.S. 920 (1988).

Despite KPERS' careful briefing below of this issue, the Eighth Circuit denied its initial petition for rehearing, and refused even to

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[8] It should also be noted — with respect to respondents' repeated references to the prior certiorari petitions filed by KPERS in this proceeding — that none of the issues presented in this petition has been presented to this Court before.

[9] *See* Petition for Rehearing (No. 96-3680), May 23, 1997, at 5-6; Second Petition for Rehearing, July 16, 1997, at 6, 8-9.

consider KPERS' second petition for rehearing, which was designed to spare the parties and this Court the burden of the certiorari process. In so doing, the Eighth Circuit has placed this case on all fours with the facts in *Huddleston*, *Exxon* and *National Union*. In all three cases — and in this case — a federal court of appeals in a case arising under state law entered judgment against the petitioner based on an interpretation of state law.[10] In each case, a timely petition for rehearing was denied. In each case, the pertinent state court then issued a decision casting doubt on the federal court's construction of state law. In each case, the petitioner then reapplied to the court of appeals, seeking leave to file a second petition for rehearing to bring the new state court decision to the attention of the court. In each case, leave was denied. In *Huddleston*, *Exxon* and *National Union*, this Court then granted a petition for certiorari, vacated the judgment below, and remanded for reconsideration in light of the intervening state court decision. It should follow the same course here.

Respondents have no answer to the controlling significance of this Court's *Huddleston* line of cases. Respondents, instead, argue that because the court of appeals had the *opportunity* to grant the second petition for rehearing, but *refused* to do so, there is no further basis for relief. *See* KPMG Opp. 18; Shook Hardy Opp. 25-26. Respondents have it precisely backwards. As *Huddleston*, *Exxon* and *National Union* make clear, it is just such a refusal by a court of appeals even to *reconsider* its judgment, when asked to do so following an intervening, controlling decision of state law, that will lead this Court to grant certiorari and remand to ensure that the court of appeals adheres to the clear dictates of *Vandenbark*.[11]

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[10] One respondent makes the confusing assertion that the temporary involvement of the RTC in this case, through respondents' assertion of meritless third-party claims against the RTC, somehow "converted this case into a federal-question case" under an admittedly now-defunct statute. KPMG Opp. 16. Whatever the point of this assertion, it is clear that *all* of the substantive claims asserted by KPERS against *all* respondents arise only under Kansas law and remain in federal court only on a strained and dubious theory of supplemental jurisdiction.

[11] It bears emphasis that the Eighth Circuit has not considered and denied KPERS' second petition for rehearing. Rather, the Eighth Circuit has simply denied KPERS leave even to *file* that petition. *See* Appendix to Dreiseszun Opp. It is also worth noting that in their oppositions to KPERS' motion for leave to file a second

As anticipated in the petition, *see* Pet. 21 n.27, respondents, focusing heavily on what they predict will happen if this Court enters a GVR order and returns the case to the Eighth Circuit, argue that a remand would not affect the ultimate outcome. But respondents do not, and cannot, effectively answer the four independent reasons set forth in the petition, explaining why these arguments are without merit.[12] Even more fundamentally, respondents ask the wrong

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petition for rehearing, respondents argued: (1) that the Eighth Circuit "lacks jurisdiction to entertain KPERS' motion for rehearing" unless KPERS could meet "the demanding standards for recalling this Court's mandate," Opposition of Shook Hardy to Motion of KPERS for Leave to File a Second Petition Out of Time and to Recall Mandate, July 26, 1997, at 2-3; and (2) that if it did grant the motion, the Eighth Circuit should permit respondents to file briefs on possible alternative grounds for affirmance. Response of Appellees Estate of Frank Morgan, et al.,July 25, 1997, at 1, 4; Response of Reimer & Koger Associates, Inc., et al., July 28, 1997, at 1.

[12] First, although respondents cite scraps of the lower court decisions designed to *suggest* that the courts below ruled, in the alternative, that some of KPERS' claims failed the Missouri five-year statute of limitations, *not a single line of either decision below addresses the Missouri limitations period.* See also note 11, *supra*. It would be highly unusual for this Court to address it in the first instance. Further, granting relief to KPERS and remanding the case would impose no additional burden on the Eighth Circuit, which is currently considering a later-filed appeal by KPERS (No. 97-1879) involving a final co-defendant in this very case, which — given the Kansas Supreme Court's intervening decision — will require the Eighth Circuit to address the Missouri statute-of-limitations issues.

Second, in light of the Kansas Supreme Court's intervening decision, KPERS now has "new grounds on which to attack the Eighth Circuit's earlier hypothetical rulings with regard to the possible applicability of the Missouri five-year statute of limitations." Pet. 21 n.27. As we argued to the Eighth Circuit below, the fact that it is now clear that KPERS is *the State of Kansas*, acting in a *governmental* capacity with respect to its investments, suggests that the State of Missouri, out of a concern for comity, would not apply a five-year general statute of limitations to its claims, but would apply *no* statute of limitations under Missouri law, given KPERS' sovereign status. *See* Brief of Appellant (No. 96-3680), Dec. 13, 1996, at 43-44. Respondents fail to address this argument.

Third, KPERS has ample basis for demonstrating that, even if the five-year period applies, KPERS would meet it on this record. Notably, respondents assume, in arguing that the contrary is crystal clear, that KPERS' claims all accrued no later than December 21, 1986. But it is undisputed that KPERS filed suit against all but two respondents (Shook Hardy and Blackwell Sanders) *within the five-year limitations period running from this date provided by Missouri law. See* Reply Brief

question in focusing on arguments that would be involved on remand. In *Huddleston*, this Court vacated and remanded because "[t]he second opinion of the Oklahoma Supreme Court * * * has at least raised such doubt as to the applicable Oklahoma law as to require its reexamination in the light of that opinion * * * before pronouncement of a final judgment in the case by the federal courts." 322 U.S. at 236-37. As the Court explained, "[t]hat doubt is not to be resolved in the first instance by this Court," but instead by the lower federal court on remand. *Id.* at 237-38. Under *Vandenbark* and *Huddleston*, that doubt requires the Eighth Circuit to reconsider its judgment. The Eighth Circuit's refusal even to entertain a petition for rehearing should lead to the same result here as in *Huddleston*, *Exxon* and *National Union*.

Of course, even if KPERS had never sought leave to file a second petition for rehearing on the basis of the *Huddleston* line of cases — that is, even if KPERS raised the intervening Kansas Supreme Court decision for the first time on certiorari — a GVR order would be warranted under this Court's longstanding practice. *See* Pet. 18-21. Here, apart from the unwarranted and improper assertion that the outcome would not change on remand, respondents have no ground for resisting the relief sought. In particular, respondents have no answer to Justice Scalia's point with respect to comity: given that this Court routinely issues GVR orders purely to ensure conformity with *this Court's intervening and controlling decisions* on federal law, there is plainly no basis to treat less respectfully *a state supreme court's* intervening and controlling decisions on state law. Pet. 20.[13]

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of Appellant at 4 n.6. And even as to the other respondents, this timetable is hardly controlling; e.g., the Eighth Circuit below, in explaining its decision, assumed at one point that "the statute began to run on . . . December 7, 1987." App. 21a.

Fourth and finally, as one respondent acknowledges (although pejoratively), *see* Dreiseszun Opp. 16-17, it is far from clear that a dismissal under the Missouri statute of limitations would have the same legal consequences as the Eighth Circuit's current dismissal under the Kansas statute of limitations. *See, e.g.*, 18 Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4441, at 366, 368 (1981) (referring to traditional rule that a "dismissal on limitations grounds merely bars the remedy in the first system of courts, and leaves a second system of courts free to grant a remedy that is not barred by its own rules of limitations").

[13] Given this Court's frequent practice of issuing GVR orders in cases bearing on the proper statutes of limitations for federal claims, this point alone is

3. The questions presented go to the heart of the proper role of federal courts in applying state law. Here the Eighth Circuit, ignoring the parallel, already briefed appeal in the Kansas Supreme Court, rushed to decide an uncertain issue of Kansas law that has dramatic consequences for the public fisc of the State of Kansas. While the case was still *sub judice*, the Kansas Supreme Court unanimously ruled that the Eighth Circuit had erroneously decided the issue. Rather than conform its judgment to the Kansas Supreme Court's intervening and controlling decision on Kansas law, the Eighth Circuit refused even to permit the *filing* of a second petition for rehearing designed to call its attention to that state court ruling. The Eighth Circuit has misconceived its role in cases involving important state interests and raising unresolved questions of state law,[14] and this Court should grant the petition to reaffirm and clarify that role.

CONCLUSION

The petition for a writ of certiorari should be granted.

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decisive. *See, e.g.*, 490 U.S. 1087-88 (1989) (issuing GVR orders in five cases in light of *Hardin v. Straub*, 490 U.S. 536 (1989)); 488 U.S. 1036, 489 U.S. 1002, 493 U.S. 929 (1989) (issuing GVR orders in three cases in light of *Owens v. Okure*, 488 U.S. 235 (1989)); 483 U.S. 1015, 484 U.S. 806 (1987) (issuing GVR orders in two cases in light of *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987)); 483 U.S. 1015 (1987) (issuing GVR order in light of *Agency Holding Co. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987)); 471 U.S. 288, 1051 (1985) (issuing GVR orders in three cases in light of *Wilson v. Garcia*, 471 U.S. 261 (1985)).

[14] The refusal of the Eighth Circuit to stay its hand despite being repeatedly informed, from the outset of the appeal, that the dispositive issue of Kansas law was pending, fully briefed, before the Kansas Supreme Court, *see* Pet. 8-11, stands in stunning contrast to this Court's order to the Tenth Circuit in *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593 (1968). There, this Court ruled that the Tenth Circuit "erred in refusing to stay its hand" until "the state law issues could be settled in a declaratory judgment suit then pending in state courts," *id.* at 594, even though: (1) the state-court declaratory judgment suit was the creation of the losing federal litigant, Kaiser Steel; (2) only a private party, not a sovereign State, was adversely affected; (3) Kaiser Steel filed the state-court declaratory judgment suit eighteen days *after* losing in the Tenth Circuit, and only then asked the Tenth Circuit to stay its hand; and (4) as a result of this Court's order, the Tenth Circuit was forced to hold the case on its docket for two years. *See W.S. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257, 262 (10th Cir. 1967), *rev'd*, 391 U.S. 593 (1968); *Kaiser Steel Corp. v. W.S. Ranch Co.*, 467 P.2d 986 (N.M. 1970).

Respectfully submitted.

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December 2, 1997

SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	)	
v.	)	
REIMER & KOGER ASSOCIATES, INC., A KANSAS CORPORATION, *et al.*, *Defendants.*	)	No. 92-0922-CV-W-9
FRANK MORGAN, et al., *Defendants and Third-Party Plaintiffs,*	)	Filed Oct. 2, 1995
v.	)	
RESOLUTION TRUST CORPORATION, *Third-Party Defendant.*	)	

TRANSCRIPT OF PROCEEDINGS

February 11, 1993

* * * *

MR. COLLINS: Your Honor, I'm Timothy Collins on behalf of the Resolution Trust Corporation. You identified two issues to deal with right now and let me address those in order.

As a preliminary point let me just say that the RTC, as Your Honor noted, tried to get this case in its motion to intervene for a very specific, well-defined, narrow purpose.

THE COURT: In order to get out?

MR. COLLINS: No, get into the case with its motion to intervene.

THE COURT: You want to get in so you can get out?

MR. COLLINS: That's right. To pursue that —

THE COURT: Which is a strange — you know, that's sort of — it's taken me a while to get sort of at ease with the whole thing. You know, you want to get in so badly that you can file a motion so you can get out. Which is a — I mean, I'm sure there's a good reason for it, it's just taken me a while to figure what it is.

MR. COLLINS: There is a reason, Your Honor. In fact, this has been done a number of different times. And the reason is that if KPERS, as the RTC asserts, is asserting claims that belong to the RTC, the only way the RTC can preserve its right to those claims and to prevent any kind of res judicata effect being given to the adjudication of those claims, it has to come into the case to get them dismissed.

And that's the only — that was the defined and the only purpose on which the RTC sought to intervene. When it did that, it unfortunately got caught up in the jurisdictional concerns of the state court with KPERS and that's how this whole thing snowballed.

I think if the RTC would have been allowed into the case last May and filed its motions, we could have been into the case, accomplished the purpose and be out and we wouldn't have these problems we've got today.

THE COURT: But the feared result, the result most feared apparently by KPERS and by the state court would have occurred. You would have removed the case to some federal court, right?

MR. COLLINS: For the purpose of pursuing our motion to dismiss. Once that's accomplished, the motion is ruled on, the RTC no longer has a reason or standing to be in the case. That's why we intervened for a limited purpose. The RTC's out of the case, there's no longer basis for federal court jurisdiction and it goes back to state court.

THE COURT: Maybe.

MR. COLLINS: And we were up front with the state court and explained exactly what we wanted to do on that.

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